Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DICO, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, by admitting and relying on expert opinion testimony that was contradicted by undisputed facts, the courts below exceeded the bounds of discretion established by this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999).

2. Whether Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9607(a), which provides that the owner and operator of a facility from which there is a release of a hazardous substance is liable for "all costs of removal or remedial action," requires the owner/operator to reimburse the government for (a) "oversight" costs incurred in overseeing removal and remedial actions carried out by private parties, (b) "indirect" costs incurred in operating the Superfund program and (c) attorneys' fees and litigation costs.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are listed in the caption. Petitioner Dico, Inc. is a wholly-owned subsidiary of Dyneer Corporation which is a wholly-owned subsidiary of Titan International, Inc., a publicly held company.

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Dico, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2a – 29a) is reported at 266 F.3d 864. The district court's order granting summary judgment with respect to response costs (App., *infra*, 32a-44a) and ruling on liability (App., *infra*, 45a-79a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2001. A timely petition for rehearing was denied on November 27, 2001. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 101 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9601, 9607, provide in relevant part as follows:

§ 9601. Definitions

. . . .

(23) . . . "removal" means . . . such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, . . . or the taking of such other

actions as may be necessary to prevent, minimize, or mitigate damages to the public health or welfare or to the environment . . .

(24) . . . "remedial action" means those actions . . . taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance . . . . The term includes . . . any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages . . . .

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section - - -

(1) the owner and operator of a . . . facility,

. . .

. . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for ---

(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national

contingency plan.

(b) Defenses . . .

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release . . . and the damages resulting therefrom were caused solely by ---

. . .

(3) an act or omission of a third party . . .

STATEMENT

This petition seeks review of two holdings of the Eighth Circuit Court of Appeals in this case. First, the court of appeals held that the district court did not abuse its discretion under this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), although it admitted and relied on opinions of the government's expert that lacked any scientific basis and were contrary to undisputed facts. Second, expressly disagreeing with the holding of the Third Circuit in *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (3rd Cir. 1993), the Eighth Circuit held that CERCLA imposes liability on landowners not only for the cost of cleaning up contamination found to exist on their land, but also for costs incurred by the government in overseeing the actions of private parties—costs the Third Circuit held are appropriately treated as part of the agency's operating budget and funded

through the congressional appropriation process—as well as the government's indirect costs, attorneys' fees and litigation expenses. This case presents an opportunity for this Court (1) to clarify the standards for admissibility and use of expert testimony under *Daubert, Joiner* and *Kumho Tire* and (2) to resolve the *Rohm and Haas* conflict with the Third Circuit.

A. Factual Background

1. The Site

The Des Moines TCE Superfund Site embraces an area associated with a large meander in the Raccoon River in Des Moines, Iowa, immediately southwest of the central business district. Dico C.A. App. 53. The Des Moines Water Works ("DMWW") occupies the central area within the meander and uses an infiltration gallery as a source of drinking water. Dico C.A. App. 57-60. Dico operated a metal fabricating plant on the east side of the meander.

In 1974, trichloroethylene ("TCE") was found in the DMWW water supply and the source of the contamination was traced to water drawn into the infiltration gallery. Dico C.A. App. 51, 272. TCE was used by a number of facilities in the area, including Meredith Corporation, a publishing company, and Solar Aircraft, an industrial facility that manufactured aircraft components and other equipment. Tr. 25051; Dico C.A. App. 66-69.

2. The Investigation

Over a period of several years during the mid-1980's, the Environmental Protection Agency ("EPA") conducted a remedial investigation of the Site and concluded that the soil and groundwater were contaminated with TCE and other

PUBLISHER'S NOTE:

Page(s) 5 missing in original.

the groundwater years later, after billions of gallons of groundwater and tons of TCE had been removed from Dico's property by the pumping of the remediation wells. Tr. 70. These substantial concentrations were caused by the pumping of groundwater from the remediation wells which drew contaminated groundwater onto Dico's property from the plumes of contamination to the north. Tr. 183. This confirmed the natural flow of groundwater from the north onto Dico's property, indicating that the North Plume and the MLKE Plume were sources of the original contamination.

B. Proceedings Below

1. The District Court

In 1995, the government filed this case under CERCLA, seeking recovery from Dico of response costs allegedly incurred due to contamination of the groundwater under its property. In April 1997, the district court granted the government's motion for summary judgment on the issue of liability. Dico appealed, and the court of appeals reversed and remanded for trial, *United States v. Dico, Inc.*, 136 F.3d 572 (8th Cir. 1998), holding that the government bore the burden of proof on the issue of causation. *Id.* at 578-79.

The case was tried to the district court in October 1999. Mr. John Robertson presented the government's only testimony regarding the cause of groundwater contamination, opining that Dico was responsible for all such contamination. Tr. 26. The computer model he relied on, however, was programmed specifically to exclude any contamination entering Dico's property from the north (Tr. 120-21, 126), despite the undisputed fact that the remediation wells drew contamination onto Dico's property from the north.

To prove the government's case, it was necessary to establish that Dico had released TCE on its property that could have migrated through the soil to the groundwater, twenty-five feet below the surface. Mr. Robertson cited the fact that, prior to the 1970's, Dico had used TCE in a vapor degreasing system in which the sludge had been collected in a steel vat and later spread on the ground as a dust suppressant. Dico presented undisputed testimony, however, that due to TCE's volatility the concentration of TCE in the soil from sludge spread on the ground would have decreased to less than five parts per billion, the maximum concentration allowed in drinking water, before it migrated even one foot into the soil. Tr. 320-23.

There was also evidence of some leakage of TCE from the steel vat into a concrete containment pit, and of minor spills of TCE onto a concrete slab during drum filling and cleaning operations. Mr. Robertson cited those leaks and spills as sources of TCE contamination of the groundwater, asserting that "concrete is a permeable substance." Tr. 62. He made that assertion, not on the basis of any scientific or other specialized knowledge, but solely on the basis of his observation that basement walls get wet "in a wet environment." *Id.* Dico, in contrast, presented undisputed data from the American Institute of Concrete showing that concrete is an impermeable barrier that would have prevented TCE or any other liquid from even reaching the soil, let alone penetrating twenty-five feet of soil to the groundwater. Tr. 370-71.

It was also essential to the government's case to establish that there was a continuous line of contamination from the surface of Dico's property to the groundwater. To show this, Mr. Robertson relied on laboratory analyses of soil boring samples. Only two small samples were tested,

however, from each twenty-five foot boring, and in two-thirds of the samples tested the laboratory tests failed to detect contamination. Tr. 89, 99. To the extent the analyses showed anything about continuous contamination, therefore, they showed that it was not present.

Prior to trial, Dico had moved in limine to exclude Mr. Robertson's testimony as failing to meet the standards of relevance and reliability established by *Daubert, Joiner* and *Kumho Tire*. Dico C.A. App. 450. The district court consolidated that motion with the trial. Tr. 5. After trial, the district court denied Dico's motion, and ruled that the government had met its burden of showing that Dico was liable for contamination of the groundwater under its property. App., *infra*, 79a. The district court then granted the government summary judgment on its request for recoupment of response costs, rejecting Dico's argument that those costs included unrecoverable oversight costs, indirect costs and attorneys' fees and litigation costs. App., *infra*, 43a-44a.

2. The Court of Appeals

On appeal, Dico argued that Mr. Robertson's opinions lacked scientific validity and factual support, and should have been excluded under *Daubert, Joiner* and *Kumho Tire*, or alternatively that they failed to carry the government's burden of proof. Dico pointed out that, although it was undisputed that remediation wells had drawn TCE contamination onto Dico's property from the north, Mr. Robertson had wrongly assumed that no contamination had entered Dico's property from the north, programming his computer to rule out any such entry. Regarding the dust suppressant sludge, Dico cited the undisputed scientific testimony that TCE in the sludge could not have penetrated more than a foot into the ground

before evaporating, and thus could not have reached the groundwater. Dico also argued that the government had failed to establish even the possibility that TCE could have leaked through the concrete containment pit or through concrete slabs, given the uncontroverted scientific data showing that concrete is impermeable. Finally, addressing the laboratory tests of soil borings relied on by Mr. Robertson, Dico argued that the number of samples tested was insufficient to prove continuous contamination even if they had all contained TCE, and pointed out that, since most of the samples tested did not contain TCE, the tests actually showed the contrary.

Dico also argued that the district court erred in granting summary judgment to the government on the issue of response costs. Citing *Rohm and Haas,* Dico argued that the government's oversight costs, indirect costs and litigation costs and attorney fees did not come within the statutory authorization for recovery of "costs of removal or remedial actions." 42 U.S.C. §9607(a).

The court of appeals affirmed the district court. Responding to the point that Mr. Robertson programmed his computer to rule out any flow of contamination from the north, the court did not suggest that what Mr. Robertson had done was justified or that it provided any support for his opinions. Instead, despite Mr. Robertson's expert report in which he relied heavily on the computer model (Dico C.A. App. 26), the court stated that the computer model "did not form the basis for [Mr. Robertson's] conclusion regarding the origin of the contamination" and that his misuse of the model was therefore "without consequence to the validity of his analysis of alternative sources for the contamination." App., *infra*, 8a. Regarding the dust suppressant sludge, the court of appeals rejected the undisputed testimony that TCE in sludge

could not penetrate even one foot before evaporating, finding support for a contrary conclusion in testimony by Mr. Robertson that "TCE is heavier than water and . . . moves more quickly than water through the soil because it is less viscous." App., *infra*, 18a. The court treated the issue of permeability of concrete as a simple disagreement between experts, stating that "Abdul [Dico's expert] testified that TCE does not move through concrete . . . [while] Robertson testified that TCE penetrates concrete" and that "[n]othing Dico has argued convinces us that the District Court clearly erred [by adopting Mr. Robertson's opinion]." App., *infra*, 18a. The court did not address the fact that Dr. Abdul's opinion was supported by published scientific data while Mr. Robertson cited no facts or scientific analysis of any kind in support of his assertion. Finally, addressing the laboratory tests of soil borings, the court of appeals again sidestepped the flaws in Mr. Robertson's analysis by asserting, contrary to Mr. Robertson's own testimony, that "he did not rely on these results to conclude that a continuous line of contamination existed." App., *infra*, 10a.

The court of appeals also affirmed the district court's summary judgment on response costs. In doing so, however, it acknowledged a conflict with the Third Circuit's decision in *Rohm and Haas*. App., *infra*, 23a ("We respectfully disagree with the Third Circuit's analysis"). Its disagreement was on two levels. First, it disagreed with the Third Circuit's holding that a clear statement of legislative intent is necessary to overcome the presumption that agency oversight activities are to be funded through the congressional budget and appropriation process and not by imposing those costs on regulated parties. It did not respond to the policy reasons given by the Third Circuit, but simply stated that the opposite result is supported by a general statutory purpose "to make the guilty parties pay." App., *infra*, 23a. Second, it

disagreed with the Third Circuit's conclusion that CERCLA reflected no such legislative intent. Again, however, the Eighth Circuit did not address the Third Circuit's careful analysis of the statutory structure and text. The court focused exclusively on the fact that the word "monitoring" is included in the statutory definition of "remedial action" without acknowledging that the Third Circuit, in its multi-faceted analysis of the text and structure of CERCLA, had specifically addressed and rejected the same argument based on the word "monitor" in the statutory definition of "removal." App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision presents two issues of continuing importance warranting this Court's review. First, the courts below failed to heed the mandate of *Daubert, Joiner* and *Kumho Tire* by admitting and relying on expert testimony that failed to pass the most basic tests of relevance and reliability. Mr. Robertson, the government's only expert, offered an opinion regarding the origin of the contamination that was based on a computer analysis rigged to exclude undisputed facts supporting Dico's position. He then tried to buttress that opinion in the face of additional undisputed evidence to the contrary by hypothesizing the presence of a substance for which there was no evidence, and which the remedial investigation had looked for and not found. He claimed that TCE reached the soil through concrete, asserting -without scientific support and contrary to undisputed published scientific data- that "concrete is permeable." And he relied on a "continuous contamination" theory that TCE migrated through twenty-five feet of soil to the groundwater despite the fact that soil boring samples and unchallenged scientific calculations flatly contradicted that theory. This Court should grant certiorari to clarify the outer bounds of

district courts' discretion in admitting expert testimony that fails to meet minimum standards of scientific reliability and relevance to the facts at hand.

Second, rejecting the Third Circuit's approach in *Rohm and Haas*, which presumed in the absence of clear statutory language to the contrary that Congress intended to keep federal agencies' funding subject to the budget review and appropriation process, the Eighth Circuit indulged the opposite presumption – that because the statute is "remedial" it should be presumed to require regulated entities to defray the cost of regulation. The conflict between the Third and Eighth Circuits is clear, and it involves a recurring question of importance to all companies subject to CERCLA enforcement proceedings. Beyond CERCLA, moreover, the circuits are in conflict on a fundamental question concerning the relationship between Congress and regulatory agencies: when Congress creates an agency and endows it with regulatory authority, should it be lightly presumed that the agency is authorized to impose the cost of regulation on regulated entities, making the agency to that extent self-sustaining and free from the congressional budget review and appropriation process? This Court should grant certiorari to resolve that conflict and establish the *Rohm and Haas* analysis as the governing law.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE LIMITS OF DISTRICT COURTS' DISCRETION IN ADMITTING AND CONSIDERING EXPERT TESTIMONY

In *Daubert*, this Court held that Fed. R. Evid. 702 imposes on district courts an obligation to "ensure that any and all scientific testimony or evidence admitted is not only

relevant but reliable." *Daubert*, 509 U.S. at 589. In *Joiner*, this Court held that appellate courts should apply an abuse of discretion standard in reviewing a trial court's decision to admit or exclude expert testimony. *Joiner*, 522 U.S. at 139. In *Kumho Tire*, this Court held that "this basic gatekeeping obligation" applies not only to expert testimony based on "scientific" knowledge but extends as well to other expert testimony, *Kumho Tire*, 526 U.S. at 147. In both *Kumho Tire* and *Joiner*, this Court determined that the district court had not exceeded the bounds of its discretion in *excluding* expert testimony. *Kumho Tire*, 526 U.S. at 142; *Joiner*, 522 U.S. at 146-47. This case presents an opportunity for this Court to further define the bounds of the district court's discretion in the context of a decision to *admit* (and rely on) expert testimony that failed to meet the relevance and reliability standards of *Daubert, Joiner* and *Kumho Tire*.

(a) The least that should be required of expert testimony is that it have some support in the record and be consistent with undisputed facts. As this Court held in *Daubert*, an essential requirement of Rule 702 is that expert testimony must be "tied to the facts of the case." *Daubert*, 509 U.S. at 591; *Kumho Tire*, 526 U.S. at 150. Mr. Robertson's testimony failed that simple test. Repeatedly, he expressed opinions—relied on by the district court and the court of appeals—that cannot be reconciled with the known facts.

(i) It was undisputed that two plumes of TCE groundwater contamination existed to the north of Dico, and that the remediation wells on Dico's property drew contaminated groundwater from the north onto Dico's

property.[1] Mr. Robertson not only ignored that undisputed fact; he programmed his computer to treat it as a non-fact. By instructing his computer program to assign zero values to any flow of groundwater from the north (Tr. 120-21, 126), he effectively assumed his conclusion in advance of any analysis, an obvious violation of the principles of *Daubert* and *Kumho Tire*.

The court of appeals did not try to justify or defend Mr. Robertson's misuse of the computer model, but avoided the issue by stating that "Dico's complaints are without consequence to the validity of [Mr. Robertson's] analysis" because the computer model "did not form the basis for his conclusion regarding the origin of the contamination." App., *infra*, 8a. The court of appeals' assumption, however, is contrary to Mr. Robertson's own expert report. In that report, Mr. Robertson states that his conclusion that "releases of TCE and related VOCs [volatile organic compounds] at Dico have contributed at least 98.7 percent of the groundwater contaminants" was "based upon [his] computer model," and that the computer modeling methodology he used is "the only feasible way to determine groundwater flow paths." Dico C.A. App. 26.[2]

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[1] The court of appeals referred to this as a "defense theory." App., *infra*, 10a. It is not a theory, however, but an undisputed fact, admitted by the EPA's own witness. Tr. 183.

[2] The court of appeals acknowledged that Mr. Robertson used the computer model for "studying the capture zones of the remediation wells" (App., *infra*, 8a), but did not explain how that differs from "determin[ing] groundwater flow paths" to reach a "conclusion regarding the origin of the contamination." To say that the contamination to the north of Dico was within "the capture zones of the remediation wells" is to say that it was, at least in substantial

Contrary to the court of appeals' assertion, therefore, Mr. Robertson's use of the computer model was central to his conclusion regarding Dico's responsibility for the groundwater contamination under Dico's property. And it is not surprising that the computer model told him Dico was responsible when he began by instructing it to rule out any flow from the only other likely direction.[3]

(ii) Having arbitrarily ruled out any flow of contaminants from the north, Mr. Robertson said his "only explanation" for the increase in TCE levels after the activation of the remediation wells, and the continued presence of TCE in the groundwater after "they've pumped billions of gallons of water out of this and tons of TCE," was that TCE must be present in the soil under Dico's property as dense non-aqueous phase liquid ("DNAPL") which was "feeding his system." Tr. 70. In a startling leap of logic, he then pointed to the increase in TCE levels as *proof* that DNAPL was present. Tr. 70-71.

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part, "the origin of the contamination." There is simply no basis for the court of appeals' assumption that Mr. Robertson's misuse of the computer model was harmless.

[3] The court of appeals' statement that "the model itself passes scrutiny under *Daubert*" (App., *infra*, 8a) is beside the point. Dico's quarrel is not with the model Mr. Robertson used but with his manipulation of the data to reach a predetermined result. As in *Kumho Tire*, the problem is not "the reasonableness in general" of the expert's methodology but "the reasonableness of using such an approach. . . to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*," particularly where he ignored "evidence of the presence of the very signs for which he looked" in applying the methodology. *Kumho Tire*, 526 U.S. at 153-54.

It is obviously wrong to say, as Mr. Robertson did (Tr. 71), that DNAPL is the "only credible explanation" for the continued presence of TCE. The other credible explanation—indeed the *most* credible explanation—is that what was "feeding this system" was the TCE-contaminated groundwater to the north. The only reason Mr. Robertson had no explanation other than DNAPL for that phenomenon is that he had arbitrarily ruled out the other explanation by instructing the computer not to consider it.

Mr. Robertson's DNAPL explanation, moreover, was contradicted by the only evidence on the subject. The remedial investigation ordered by the EPA—and later reviewed and approved by the EPA—specifically checked for the presence of DNAPL and concluded that "DNAPL was not detected in any of the wells tested." Dico C.A. App. 256; Tr. 147-48. Thus not only was the presence of DNAPL not the "only credible," or even the most credible, explanation for the continuing presence of TCE in the groundwater; given that the only evidence was that DNAPL was not there, it was an explanation with no credibility whatsoever.

(iii) Mr. Robertson's opinion that TCE in sludge spread on the ground as a dust suppressant penetrated 25 feet of soil to the groundwater was further refuted by testimony from Dr. Abdul, Dico's expert, demonstrating that the TCE could not have penetrated even a foot into the ground before evaporating. Tr. 320-23; Dico C.A. App. 113-114. That evidence, based on Dr. Abdul's measurement of TCE levels in the sludge and mathematical calculations to determine the migration of TCE through the soil, was uncontroverted. [4]

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[4] Dr. Abdul made his calculations using "worst-case" assumptions. For example, he assumed the ground would be moist, although it

Mr. Robertson engaged in no such scientific process; indeed he did not even address Dr. Abdul's analysis. The only testimony the court of appeals cited to contradict Dr. Abdul was Mr. Robertson's testimony that "TCE is heavier than water and . . . moves more quickly than water through the soil because it is less viscous" (App., *infra*, 18a). There was no evidence, however, to indicate how far *water* penetrates soil before evaporating. And even if there had been such evidence, comparison of the weight and viscosity of TCE and water tells nothing about the extent to which sludge containing TCE would penetrate the soil before evaporating. Finally, Mr. Robertson was speaking of *liquid* TCE, not sludge. Tr. 38. There is no question that sludge, unlike liquid TCE, is much *more* viscous than water. In short, the testimony the court of appeals relied on to contradict Dr. Abdul did not even begin to do so, and certainly provided no basis for disregarding the only scientific evidence in the record.

(iv) For TCE even to get to the soil from the degreasing vat or the drum-filling operation, it would have to migrate through concrete. Dr. Abdul presented uncontroverted data published by the American Institute of Concrete showing that concrete is an impermeable substance. Tr. 370-71.

Mr. Robertson did not dispute that data, and offered no data of his own. He simply made the statement that

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is likely that dust suppressant would be used only when the ground is dry; without moisture in the soil, the sludge would not penetrate at all. Tr. 322-23. Similarly, he assumed the TCE would remain in the sludge as the sludge penetrated the soil, although TCE, which is highly volatile, would likely evaporate before any appreciable penetration took place. Tr. 323.

"concrete is permeable" without pretending to offer any scientific support. Tr. 62. His only elaboration of that statement was the observation that basement walls get wet "in a wet environment, standing water behind the wall" (*Id.*), an observation which, even if it were verifiable, would fall far short of supporting Mr. Robertson's assertion.[5]

The court of appeals disposed of the issue by simply stating that "the District Court found Robertson's testimony more persuasive and credible" and that "[n]othing Dico has argued convinces us that the District Court clearly erred in so concluding." App., *infra*, 18a. In fact, the district court neither adopted Mr. Robertson's testimony nor rejected Dr. Abdul's. It found only that TCE "escaped" from the concrete containment pit (App., *infra*, 48a) which, given the high volatility of TCE, it could easily do by evaporating. Tr. 323. In any event, the evidence is entirely inconsistent with any finding, by the district court *or* the court of appeals, that "TCE permeates concrete." App., *infra*, 18a.

(v) To support his opinion that Dico's operations on the surface of its property contributed to the groundwater contamination twenty-five feet below the surface, Mr. Robertson relied on laboratory analysis of soil boring samples. He testified that that analysis would determine whether or not the source of groundwater contamination was "something released near the surface that goes down through the soil into the groundwater" because "whenever [contaminants] move down through the soil, they leave a trail behind them." Tr. 38.

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[5] The obvious explanation for wet basement walls in a wet environment is condensation, an explanation that at least has the virtue of being consistent with the undisputed scientific evidence.

Of each 25-foot boring, however, only two 2-foot samples were sent to the laboratory. Tr. 89. Even if all those samples had been contaminated, that would have been insufficient to establish a continuous line of contamination. as Mr. Robertson admitted. Tr. 100. But all the samples were not contaminated; approximately two-thirds of the borings tested showed *no* continuous contamination. Tr. 99. The soil boring analysis, therefore, not only failed to support Mr. Robertson's conclusion, but directly contradicted it.

The court of appeals was wrong in stating that Mr. Robertson "did not rely on these results." App., *infra*, 10a. Mr. Robertson specifically testified that "the *primary evidence* of the continuous contamination" was "the entire suite of *soil borings* and their sample and laboratory analysis, their locations relative to contamination sources and their locations relative to the groundwater contamination." Tr. 101 (emphasis added). He never explained how soil boring samples that were both inadequate in number and contrary to his conclusion could be "primary evidence of . . . continuous contamination."

It is no answer to say, as the court of appeals did, that "the sufficiency of the factual basis of Robertson's continuous line theory was open to any challenge Dico desired to mount on cross-examination." App., *infra*, 10a. That was precisely the challenge Dico *did* mount on cross-examination, which the district court also considered in support of Dico's *Daubert* motion.[6] Given the utter absence of factual support for Mr.

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[6] Dico's motion to exclude Mr. Robertson's opinion was consolidated with his trial testimony. Tr. 5-7. It was understood that Dico's cross-examination related to the admissibility as well as the weight of Mr. Robertson's testimony. Tr. 14, 24, 27.

Robertson's opinion regarding continuous contamination, the district court's failure to exclude it was an abuse of discretion.

(b) "The word 'knowledge' [in Fed. R. Evid. 702] connotes more than subjective belief or unsupported speculation.... Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' *based on what is known*." *Daubert*, 509 U.S. at 590 (emphasis added). Opinion evidence is properly excluded when "there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146. Trial judges should ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire*, 526 U.S. at 152, and exclude testimony that falls "outside the range where experts might reasonably differ." *Id.* at 153.

In *Joiner* and *Kumho Tire*, this Court applied those principles in holding that district courts had not abused their discretion by excluding expert testimony. In this case, the district court abused its discretion by admitting expert testimony in disregard of those principles. Although trial judges have "considerable leeway" in exercising their discretion to admit or exclude expert testimony, *Kumho Tire*, 526 U.S. at 152, that discretion "is not discretion to abandon the gatekeeping function... [or] to perform [it] inadequately." *Id.* at 158 (Scalia, J., concurring).

Mr. Robertson's testimony failed those tests at every level of his analysis. He refused to consider the undisputed fact that contamination flowed onto Dico's property from the north, basing his opinion on a computer analysis from which that fact had been deliberately excluded. He purported to explain the continual presence of TCE in the groundwater, which otherwise could only have come from the north, by the

assumed presence of DNAPL, for which there was no evidence and which the remedial investigation had specifically looked for and failed to find. He failed even to address, let alone to dispute, Dico's evidence that TCE in dust-suppressant sludge evaporates long before it could migrate to the groundwater. His assertion that the concrete containment pit and concrete slab are "permeable" was flatly contradicted by the only evidence on the point. And to show continuous soil contamination, he relied on soil boring tests that, to the extent they showed anything, showed an *absence* of such contamination.

Expert testimony, to be admissible, must be "tied to the facts of the case." *Daubert*, 509 U.S. at 591. It should be excluded unless "the reasoning or methodology underlying the testimony is scientifically valid and. . . properly can be applied to the facts in issue." *Id.* at 592-93. Facts and data upon which expert testimony is based are limited to those "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject." *Id.* at 595 (quoting Fed. R. Evid. 703). The trial judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," *Id.* at 597, and should be particularly wary of "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157 (quoting *Joiner*, 522 U.S. at 146).

In *Joiner* and *Kumho Tire*, this Court held that the district courts performed their "gatekeeper" function properly by excluding expert testimony. In this case, the district court failed to perform that function, admitting and relying on expert testimony that lacked the most basic elements of relevance and reliability. This Court should grant certiorari to further define the responsibility of district courts to monitor the use of experts under Fed. R. Evid. 702.

II. THE EIGHTH CIRCUIT'S IMPOSITION OF INDIRECT AND OVERSIGHT COSTS ON DICO IS IN CONFLICT WITH THE THIRD CIRCUIT

In *Rohm and Haas*, the Third Circuit held that CERCLA does not authorize courts to impose on defendants the cost of the government's "oversight," or "costs incurred by the government in monitoring private parties' compliance with their legal obligations." *Rohm and Haas*, 2 F.3d at 1273. Unlike the actual cost of "cleaning up the messes [private parties] have made," which, as the Eighth Circuit observed in this case, is appropriately borne by the private parties themselves (App., *infra*, 23a), oversight costs are simply part of the government's job of regulation:

> The budget and appropriation process gives executive agencies an incentive to operate efficiently and makes them accountable to the Congress. When an agency asserts the right to secure financing of its activities by assessing its costs against those whom it regulates, that incentive and accountability are lost.

Rohm and Haas, 2 F.3d at 1274. The Third Circuit noted that adopting the government's position "could result in the funding for a substantial amount of EPA activity ... being shifted away from general revenue to specific levies on certain private parties," and declined to infer such Congressional intent in the absence of clear and explicit statutory language. *Id.* Because the Third Circuit found no such clear and explicit language in CERCLA, it held that no such costs were recoverable. *Id.* at 1276-78. The Third Circuit specifically addressed and rejected the government's argument that recovery of such costs was authorized by the statutory definition of "removal" to include "such actions as

may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," holding that that language referred to actual monitoring rather than oversight of someone else's monitoring. *Id.* at 1275-76.

The court of appeals' decision in this case is in direct conflict with *Rohm and Haas* in two respects. First, the Eighth Circuit "respectfully disagree[d]" with the Third Circuit's holding that, because oversight costs are ordinarily paid out of agency appropriations, Congressional intent to the contrary would have to be clearly expressed. App., *infra*, 23a. Second, the Eighth Circuit found such a clear expression in CERCLA's definition of "remedial action" to include "monitoring" (App., *infra*, 24a), while the Third Circuit expressly rejected the argument that "monitor[ing]" includes agency oversight. *Rohm and Haas*, 2 F.3d at 1275-76.

The principal issue between the Eighth and Third Circuits is one of presumptions. The Eighth Circuit held in this case that, because "CERCLA is a remedial statute" and because "[t]he provisions allowing the EPA to recover costs are meant to make the guilty parties pay," it should be presumed that the costs of regulation are borne by the regulated parties, even without a clear statement of legislative intent to that effect. App., *infra*, 23a. To the Third Circuit, in contrast, "the guiding principle" is that courts should "not presume Congress to have intended a statute to create the dramatic and unusual effect of requiring regulated parties to pay a large share of the administrative costs incurred by the overseeing agency unless the statutory language clearly and explicitly requires that result." *Rohm and Haas*, 2 F.3d at

1274.[7]

The Third Circuit cited *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) ("*NCTA*") for the proposition that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties." *Rohm and Haas*, 2 F.3d at 1273 (quoting *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989)). The Eighth Circuit and other courts that have disagreed with the Third Circuit[8] have done so by distinguishing *NCTA* on its

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[7] The analysis of *Rohm and Haas* applies with equal force to the government's oversight costs, indirect costs and attorneys' fees and litigation expenses. Although *Rohm and Haas* addressed only oversight costs, the Eighth Circuit in this case treated indirect costs, defined as including "costs expended for the operation of the Superfund program to support site-specific cleanup activities" (App., *infra*, 20a), as being governed by the same principles as oversight costs. App., *infra*, 21a-22a. The Eighth Circuit also affirmed the district court's award of attorneys' fees, relying on the definition of "respond" or "response" in 42 U.S.C. §9601(25). App., *infra*, 25a (terms include "response, removal, and remedial action" which include "enforcement activities related thereto"). Because there is no specific authorization in CERCLA for the imposition on respondents of the government's attorneys' fees and litigation costs, there is no reason to treat them differently from other costs of the government's "enforcement activities."

[8] Like the Eighth Circuit in this case, other courts that have disagreed with *Rohm and Haas* have not attempted to respond fully to the Third Circuit's analysis. *E.g.*, *United States v. Lowe*, 118 F.3d 399, 400-01 (5th Cir. 1997) (relying on "remedial" nature of CERCLA); *Atlantic Richfield Co. v. American Airlines, Inc.*, 98

facts, which is of course easily done. App., *infra*, 23a. That treatment of *NCTA* and *Rohm and Haas*, however, begs the question whether the "guiding principle" of *NCTA*, summarized by this Court in *Skinner* and applied to CERCLA by the Third Circuit in *Rohm and Haas*, is a valid one.[9]

This Court should take the opportunity to affirm that guiding principle in this case. It is one thing to say, as the court of appeals did in this case, that CERCLA is "designed to make parties responsible for introducing hazardous waste into the environment pay for cleaning up the messes they have made." App., *infra*, 23a. It is quite another thing, however, to say that Congress intended that those parties should pay the EPA's expenses incurred in the process of overseeing that

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F.3d 564, 567-68 (10th Cir. 1996) (same). *Rohm and Haas* continues to be cited by respondents in CERCLA proceedings, and is followed by courts in the Third Circuit and elsewhere. *E.g.*, *United States v. Serafini*, 898 F.Supp. 287, 289-90 (M. D. Pa. 1994); *United States v. Witco Corp.*, 853 F. Supp. 139, 143 (E. D. Pa. 1994); *Central Maine Power Co. v. Aetna Cas. & Sur. Co.*, 838 F.Supp. 641, 648 (D. Me. 1993). *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1580 (Fed. Cir. 1996) (Nies, J., concurring).

[9] The question has inspired considerable law review commentary. *E.g.*, Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?, 20 Harv. Envtl. L. Rev. 199 (1996) ; Recoverability of Government Oversight Costs Under CERCLA Section 107: United States v. Rohm and Haas Co., 6 Vill. Envtl. L.J. 123 (1995); Rohm & Haas Was Right: Recovery of Government Oversight Costs in Private Party Response Actions, 19 Wm. & Mary Envtl. L. & Pol'y Rev. 253 (1995).

clean-up. The concern expressed by the Third Circuit in *Rohm and Haas*, that Congress should not be lightly assumed to have abdicated its budgetary and oversight function, is a real one, and it is one that none of the courts that have disagreed with the Third Circuit—including the Eighth Circuit in this case—have directly addressed.

The Eighth Circuit also disagreed with the Third Circuit on the meaning of "monitor[ing]" in CERCLA. In *Rohm and Haas*, the Third Circuit found no clear expression in CERCLA of legislative intent to impose the costs of EPA oversight on regulated parties, despite the fact that the definition of "removal" included "such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23). The court read that language as referring to "actual monitoring of a release or threat of release rather than oversight of the monitoring and assessment activities of others." *Rohm and Haas*, 2 F.3d at 1275-76. The Third Circuit held that this reading of the statutory language is consistent with CERCLA's distinction "at all stages—assessment, response formulation and execution—between actions taken to define the scope of the risk created by a release or threatened release and actions taken to evaluate the performance of others to determine whether they are meeting their legal obligations." *Id.* at 1276.

"Given the context in which CERCLA was enacted," the Third Circuit also found it "highly significant that Congress omitted any mention of oversight... in the definition of removal":

> "[G]iven the congressional preference for settlements and. . . consent orders, . . . it

> might be expected that removal and remedial activity conducted and paid for by private parties would be much more common than... government cleanups .... Given the extent of this expected private activity and the established prior practice of financing oversight activities from appropriated funds, a directive that EPA would henceforth be able to recover all of the costs of overseeing private corrective actions... would represent a major policy change."

Id. at 1276-77. The Third Circuit concluded that it was "difficult to believe that Congress would choose to manifest such a change" in the way argued by the government. *Id.* at 1277. The Third Circuit also found evidence of congressional intent not to include oversight in the definition of removal in the fact that other sections of CERCLA treat oversight costs separately from the costs of removal and remedial action. *Id.* at 1277-78.

The Eighth Circuit attempted to distinguish *Rohm and Haas* on this point by noting that *Rohm and Haas* dealt with "removal" while this case involves "remedial action." App., *infra*, 24a. It offered no reason, however, why Congress might have intended "monitoring" in the definition of "remedial action" (42 U.S.C. §9601(24)) to mean something different from "monitor" in the definition of "removal" (42 U.S.C. §9601(23)), particularly where the relevant substantive provision lumps the terms together, referring to "all costs of removal or remedial action." 42 U.S.C. §9607(a)(1)(A). And the Third Circuit's "highly significant" observation that "Congress omitted any mention of oversight. . . in the definition of removal," *Rohm and Haas*, 2 F.3d at 1276, applies with equal force to the definition of

remedial action. The Third Circuit's analysis of the overall scheme of CERCLA, moreover, suggests no distinction in this respect between "removal" and "remedial action"; to the contrary, the Third Circuit frequently treats the two as identical for this purpose. *See, e.g.*, *Rohm and Haas*, 2 F.3d at 1276 (using "removal or remedial action" interchangeably with "corrective action"), 1277 (several references to CERCLA's authorization of "removal and remedial action"), 1278 ("costs of overseeing removal or remedial activities" held to be not "in themselves removal costs"). The Third Circuit's opinion, therefore, is inconsistent with the notion that there is a distinction between "removal" and "remedial action" for purposes of determining the recoverability of oversight costs under CERCLA.

In contrast to the Third Circuit's careful and thorough analysis of the statutory scheme, the Eighth Circuit in this case simplistically concluded that, because CERCLA is a "remedial statute" designed to make responsible parties "pay for cleaning up the messes they have made," it must have been meant to require them to pay the government's oversight costs as well. App., *infra*, 23a. It criticized the Third Circuit's reliance on *NCTA* on the ground that the cost recovery provisions of CERCLA "are meant to make the guilty parties pay" (*Id.*), but it did not respond to any of the many reasons the Third Circuit found in the text of the statute for concluding that Congress did not authorize recovery of oversight costs.[10]

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[10] Shortly after the Third Circuit's decision in *Rohm and Haas*, legislation was introduced in Congress to amend Section 107 of CERCLA specifically to authorize courts to order respondents to pay the government's oversight costs. H.R. 228, 104th Cong., 1st Sess. (1995). Although other amendments to Section 107 were adopted in 1996, that provision was not among them. Pub. L. 104-

Petitioner submits that *Rohm and Haas* was correctly decided, and that the Eighth Circuit's decision in this case is contrary not only to *Rohm and Haas* but to the language and intent of CERCLA. This Court should grant certiorari to resolve the conflict between the Eighth and Third Circuits and adopt the Third Circuit's analysis as the governing law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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208, Div. A, Title II, §2502(a), Sept. 30, 1996, 110 Stat. 3009-462; Pub. L. 104-287, §6(j)(2), Oct. 11, 1996, 110 Stat. 3400.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-2430

[Filed, November 27, 2001]

United States of America,	)
Appellee,	)
	)
v.	)
	)
DICO, Inc.,	)
Appellant.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge John R. Gibson did not participate in the consideration or decision of this case. (5128-010199)

November 27, 2001

Order Entered at the Direction of the Court:
/s/ _____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-2430

[Filed, September 19, 2001]

United States of America,	)
Plaintiff - Appellee,	)
	)
v.	)
	)
Dico, Inc.,	)
Defendant - Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Iowa

JUDGES:
Before BOWMAN and FAGG, Circuit Judges,
and PIERSOL,[1] District Judge.

[1] The Honorable Lawrence L. Piersol, Chief Judge, United States District Court for the District of South Dakota, sitting by designation.

OPINION

BOWMAN, Circuit Judge.

The United States sued Dico, Inc., pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675 (1994 & Supp. IV 1998), to recover response costs incurred for the cleanup of groundwater contaminated by trichloroethylene (TCE)[2] and other chlorinated volatile organic compounds (VOCs). The District Court[3] held a bench trial and found Dico liable for response costs incurred in connection with the groundwater contamination. The court also granted summary judgment to the United States on the amount of cleanup costs it was entitled to recover from Dico. Dico appeals both as to liability and damages. We affirm.

I.

This litigation returns to this Court for the third time. The case arises from the EPA's determination, made in the mid-1970s, that the Des Moines public water supply had been contaminated by TCE and other chlorinated VOCs. Dico's property sits within the boundaries of the Des Moines TCE Site (the Site), the land area identified by the EPA as the source of the contamination. Dico and other businesses

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[2] "TCE is a suspected human carcinogen and also has been linked to neurological damage, and, at high exposure, death." *Dico, Inc. v. Diamond*, 35 F.3d 348, 349 n.2 (8th Cir. 1994) (Dico I).

[3] The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa.

located within the Site had for many years used TCE for degreasing and other industrial applications. The EPA designated Dico as a potentially responsible party under CERCLA and issued a cleanup order to Dico. Dico complied, thereby incurring response costs. Moreover, the EPA itself incurred costs in connection with the cleanup of the Site. For a detailed history and factual background of the prior litigation, *see Dico I*, 35 F.3d at 349-50 (reversing grant of summary judgment to the EPA in Dico's suit against the EPA seeking reimbursement for response costs it incurred in complying with the EPA's cleanup order), and *United States v. Dico, Inc.*, 136 F.3d 572, 574-75 (8th Cir. 1998) (Dico II) (reversing grant of summary judgment to the EPA in the EPA's cleanup-cost recovery action against Dico).

Following our remand in Dico II, the District Court heard the EPA's suit against Dico at a bench trial. The EPA's theory of the case was that Dico had released TCE on its property via numerous sources and activities: leaks from vapor degreasers that used TCE to degrease metal parts manufactured by Dico; spreading TCE-laden sludge as a dust suppressant on the ground around Dico's buildings; dumping TCE sludge directly onto the ground; storing TCE sludge in drums left exposed to the weather; leaks from railcars, drums, and storage tanks used in Dico's chemical repackaging and supply business; and cleaning of TCE storage drums at Dico's facility. The EPA further contended that the TCE released by Dico migrated through the soil into the groundwater below Dico's property.

In defense, Dico attempted to identify potential alternative sources for the groundwater contamination. Dico argued that all of the groundwater contamination the EPA

attributed to its activities actually originated with polluters located to the north of its property. Dico contended that contamination found a mile north of Dico, near the Martin Luther King Expressway (MLKE area), migrated with groundwater flowing south into the aquifer below Dico's property. Dico also attacked the government's case by arguing that even if Dico released TCE, none of the TCE could have migrated far enough down through the soil to reach the groundwater.

The District Court found Dico liable for the costs incurred by the EPA in cleaning up the groundwater at the Site, but delayed its decision on the amount of the cleanup costs to be awarded to the EPA pending a hearing on the EPA's motion for summary judgment on that question. After a hearing, the District Court granted summary judgment to the EPA, awarding it $ 4,129,426.67 in cleanup costs. Dico appeals both the liability and the award portions of the judgment entered by the District Court.

II.

Dico challenges the District Court's liability determination on numerous grounds. We first address Dico's objections to evidentiary rulings on the admission of expert testimony and of deposition testimony offered by the government after the close of both parties' cases-in-chief.

A.

Dico argues that the District Court erred in refusing to exclude the testimony of John Robertson, the government's expert hydrogeologist, because "his methodology was

unreliable." Appellant's Br. at 29. We review a district court's decision to admit expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), for an abuse of discretion. *Kumho*, 526 U.S. at 152; *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997). Admissible expert testimony must be grounded upon scientifically valid reasoning or methodology.[4] *Daubert*, 509 U.S. at 592-93. The court must examine both the relevance and the reliability of the proffered testimony, *Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035, 1040 (8th Cir. 1999), keeping in mind that "the focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

Dico does not dispute the relevance of Robertson's testimony. Rather, Dico challenges the reliability of Robertson's testimony, urging us to reject his methodology and exclude his testimony on several grounds. First, Dico argues that Robertson's analysis of the contamination found on its property is fundamentally flawed because he ignored evidence suggesting alternative sources for the contamination. Dico argues that Robertson improperly excluded from his computer model any consideration of groundwater flow onto

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[4] Some of the factors relevant to this inquiry include whether the theory or technique at issue can be tested, whether it has been subjected to peer review and publication, whether its rate of error is known, whether there are standards that are maintained to control the technique's operation, and whether the technique has gained acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

Dico's property from the north,[5] failed to consider the Ingersoll Run as a conduit for contamination originating off of Dico's property,[6] disregarded data indicating that the amount of TCE in the Dico remediation wells increased after their activation,[7] and ignored all data regarding TCE contamination in the MLKE area.

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[5] Dico also argues that Robertson mischaracterized the soil permeability in the north area as low because the United States Department of Agriculture (USDA) classifications of soil in this area indicated moderate permeability. Robertson testified that the USDA classifications apply only to the upper three to six feet of the soil, and thus are primarily meant for agricultural purposes. Tr. at 152. He distinguished these classes from those of the deeper soils in the area, and noted that the wells drilled there could not produce water as would wells drilled in an aquifer. Thus, he reasoned that the permeability of the soil was low *compared to* the surrounding areas. *See* Tr. at 129-30.

Moreover, Dico urges us to reject Robertson's analysis because the EPA's report on the north area stated that a permeable sand lens thirty feet thick underlaid parts of that location. *See* Tr. at 342. Dico's argument is unpersuasive; the report itself further states that the "sand lens does not appear to be connected hydraulically to the lowland flood plain alluvial deposits" found below the Racoon River. U.S. EPA, Remedial Investigation Report, Des Moines TCE OU NO. 3, 1-3 (June 24, 1992). The Racoon River sits between Dico and the north area, and thus the sand lens appears not to factor into groundwater flow toward Dico from the north. The District Court did not abuse its discretion in rejecting Dico's arguments on these issues.

[6] The Ingersoll Run is a drainage ditch that runs from north to south through the eastern portion of Dico's facility and terminates in a drainage pond at the south end of the property.

[7] Dico argues that this data supports its defense that the pollution that was recovered actually originated elsewhere and was sucked into the aquifer below Dico's property by the operation of the wells.

The record undermines Dico's characterization of Robertson's analysis. First, Dico's arguments regarding Robertson's computer model are inapposite because Robertson testified that the model did not form the basis for his conclusion regarding the origin of the contamination. Tr. at 156. Robertson used the model for a limited purpose-studying the capture zones of the remediation wells within the boundaries of Dico's property. Tr. at 157. Thus, Dico's complaints regarding the data Robertson put into the model are without consequence to the validity of his analysis of alternative sources for the contamination. Furthermore, the model itself passes scrutiny under *Daubert*. Known as MODFLOW, the model is sanctioned by the EPA and is considered a standard model that is acceptable and commonly used by hydrogeologists. Tr. at 306. Dico's expert hydrogeologist used the same computer model as Robertson in his evaluation of the Site. *Id.*

Robertson's testimony also shows that he considered each piece of data that Dico alleges he ignored. He looked at data regarding whether the Ingersoll Run was a conduit of contamination onto Dico's property. Citing the negative results of tests performed on soil borings taken close to the Run and on sediment samples from the pond at its terminus, Robertson rejected the Run as a possible source. Tr. at 73-74. Moreover, Robertson's testimony reflects that he considered the data indicating that the amount of TCE in the Dico remediation wells increased after their activation. He explained that he used the continued existence of contamination to support his conclusion that TCE in dense non-aqueous phase liquid form (DNAPL) existed in the soil beneath Dico's property. Tr. at 70-71. Similarly, Robertson did not ignore data regarding contamination in the MLKE

area. Rather, he testified that he examined data in the reports on the area and considered the amounts and location of the contamination in relation to the topography between the MLKE area and Dico's facility. Tr. at 128. From his study, Robertson concluded that the clearly delineated borders of the contamination and the different chemical fingerprints of the chemicals of concern present at the MLKE area precluded that site from being the source of the TCE removed from the groundwater by the Dico remediation well system. Dico's arguments regarding the reliability of Robertson's analysis of alternative sources of contamination do not show an abuse of discretion by the District Court in admitting Robertson's testimony.

Dico argues, as a second ground for excluding Robertson's testimony, that his analysis of the migration of TCE from the soil into the groundwater at Dico's property is based on unreliable methodology. Dico claims that Robertson's "continuous line theory" and conclusion that the contaminants left a trail of DNAPL in the soil are unsupported by the record. Dico's challenge rests primarily on the argument that the number of soil samples taken was insufficient to support Roberton's conclusions. As part of its examination of the contamination on Dico's property, Dico's contractor, Eckenfelder, Inc., drilled sixty-nine deep soil borings on Dico's property, each approximately twenty-five feet deep. From each twenty-five foot boring, approximately two small samples were sent to a laboratory for analysis. Dico contends that even if every sample tested contained TCE, such a small section of each boring was examined that the results cannot reliably support the conclusion that contamination existed continuously from the surface to the groundwater.

Robertson specifically testified that he did not rely on these results to conclude that a continuous line of contamination existed; rather, he used the results as a check that bolstered a conclusion he had already reached based upon other evidence collected. Because Dico challenges Robertson's conclusion by citing evidence that he did not use to form that conclusion, Dico's challenge fails. Moreover, the sufficiency of the factual basis of Robertson's continuous line theory was open to any challenge Dico desired to mount on cross-examination, but that sufficiency was not a basis for excluding Robertson's testimony altogether. See *Hose v. Chicago N.W. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (stating that sufficiency of factual basis of expert testimony goes to credibility, not admissibility, unless expert's opinion "is 'so fundamentally unsupported that it can offer no assistance to the jury'" (quoting *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988))). Robertson cited several sources of evidence for his opinion: the organic vapor analyzer readings indicating the presence of chlorinated VOCs in the soil, the composition of the chemicals present in the soil, and the long-term presence of contamination despite the implementation of the remediation system. The District Court did not abuse its discretion in concluding that Robertson offered sufficient factual support for his opinion to withstand Dico's challenge to its admissibility.

As to Dico's attack upon Robertson's conclusions regarding the presence of DNAPL in the soil at the Dico facility, Robertson postulated that the existence of DNAPL in the soil accounts for the continued recovery of TCE by the remediation wells on Dico's property, in contrast to the defense theory that the remediation wells sucked contaminated groundwater from the MLKE area into the aquifer below

Dico's property. Robertson testified that Eckenfelder based its conclusion that DNAPL was not present in the soil on a solubility threshold that was ten times greater than the standard accepted in the field. Several of the measurements of TCE taken by Eckenfelder for its report met the currently accepted standard and thus indicated the presence of DNAPL in the soil. Therefore, his opinion was not contrary to the published data and reports; rather, it used that data and applied a different and professionally accepted standard. Robertson's conclusion is, moreover, in accord with the conclusion drawn by Dico's consultant, Eckenfelder, that DNAPL was probably present in the soil at Dico's facility. *See, e.g.*, Tr. at 147. The District Court did not abuse its discretion by refusing to preclude Robertson's testimony on this basis.

Third, Dico asserts that Robertson's testimony is unreliable because his findings are, in at least three instances, based upon insufficient data. Again, because "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination," the District Court properly refused Dico's invitation to exclude Robertson's testimony on this ground. *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) (holding district court did not abuse its discretion by admitting expert testimony challenged by defendant as being "insufficiently supported by facts"); *accord Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997) (same).

In sum, Dico's objections to the District Court's decision to admit Robertson's expert testimony amount to an

argument that the District Court should have given more weight to Dico's expert's interpretation of the data at issue.[8] Dico has not pointed to any deficiency in the reliability of Robertson's testimony that would lead us to conclude the District Court abused its discretion.

B.

Hydrogeologist Abdul S. Abdul provided expert testimony on behalf of Dico. The District Court excluded several opinions offered by Abdul because they were not contained in his expert report or otherwise disclosed to the United States prior to the bench trial. Dico argues that the District Court erred.

Dico's objection to the District Court's ruling on Abdul's opinion testimony is without consequence. The court specifically stated that "the outcome of the litigation would not change even if the above opinions were admitted due to the fact [that] Dr. Abdul and Dico has [sic] failed to establish a clear connection between the contamination found in the MLKE project area and that pulled from the groundwater beneath the Dico property." *United States v. Dico, Inc.*, No. 4-95-10289, at 18 n.12 (S.D. Iowa Feb. 14, 2000) (Ruling on

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[8] Dico's argument that the District Court misapplied the burden of proof on the admissibility of Robertson's testimony is without merit. The record shows that the government laid an adequate foundation for the admission of his testimony. "Vigorous cross-examination [and] presentation of contrary evidence . . . are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. By noting that Dico failed to present evidence of any other methodology that Robertson should have applied, the court merely emphasized that Dico's *Daubert* challenge was not, in the court's view, well-founded.

Liability and Order Setting Hearing Date). Furthermore, the excluded opinions, even if considered, would not persuade this court that the District Court erred in its ruling on the admission of Robertson's testimony (or, for that matter, in its findings on causation, *see infra* pt. III). *See supra* pt. II. A.

C.

Dico argues that the District Court abused its discretion in admitting deposition testimony from three witnesses that the government offered into evidence after both sides had rested their cases. Dico had filed pretrial motions to exclude these depositions, but the District Court had ruled that the deposition testimony was admissible. The government did not specifically offer the depositions during its case-in-chief. After Dico finished presenting its case, the District Court asked the government's counsel about the depositions. The government responded that it had intended to offer the deposition testimony, but that it had apparently misunderstood the court's procedure regarding when and how that testimony would be admitted. The government indicated that it would like to have the testimony admitted and, over Dico's objections, the court admitted the deposition testimony into evidence after the close of Dico's case.

It has been our long-standing judgment that "a court has, of course, the general power to reopen a case, either on motion of a party or on its own motion, while the matter is still under advisement, for the receipt of further evidence." *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 34 (8th Cir. 1966). Nonetheless, "it is not the business of a court to make additions of evidence in a submitted case on its own motion other than as there may be some element of such probative

importance that its addition will prevent a miscarriage of justice from occurring in the situation." *Id.* We review the exercise of such power for an abuse of discretion. *See id.*

We hold that the District Court did not abuse its discretion by admitting the disputed deposition testimony offered by the government. At the time the court decided to admit the disputed testimony, the court offered Dico the opportunity to present additional evidence in response to it. *See Briscoe v. Fred's Dollar Store, Inc.*, 24 F.3d 1026, 1028 (8th Cir. 1994) ("It is not an abuse of discretion for a district court to reopen a plaintiff's case where a defendant is given an opportunity to challenge the new evidence introduced."); *see also Ingram v. Mo. Pac. R.R. Co.*, 897 F.2d 1450, 1455 n.5 (8th Cir. 1990) (finding no abuse of discretion where plaintiff was permitted to introduce evidence after both sides had rested). Moreover, Dico was not surprised by the government's evidence; it had been the subject of pretrial motions and a pretrial order, and Dico had submitted counter designations of deposition testimony to be admitted in response to the sections offered by the government. The court unambiguously assured Dico that it would consider both the government's designations and Dico's counter designations. Finally, the court allowed Dico the opportunity to review the testimony as it was marked and submitted in the court's bench book to further ensure that Dico was satisfied with the manner in which the testimony and Dico's counter designations were submitted. The District Court exercised great caution in affording Dico an adequate opportunity to respond to the testimony at issue. We see no abuse of discretion in the District Court's actions.

III.

Dico next challenges the judgment against it by arguing that the government failed to meet its burden of proof on causation. Dico attacks the two factual findings upon which the District Court's liability holding rests. The District Court found that releases of hazardous substances occurred on Dico's property and that a causal nexus exists between these releases and the groundwater contamination at the Site. As part of the second finding, the court found that the hazardous materials released on Dico's property migrated through the soil to reach and contaminate the groundwater. We review these findings of fact for clear error. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 938 (8th Cir. 1995).

A.

CERCLA defines "release" to mean "*any* spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing" of hazardous wastes "into the environment." 42 U.S.C. §9601(22) (emphasis added). The District Court found that TCE was released into the soil on Dico's property in four ways. First, "some quantity of TCE leaked from known cracks in the degreasing vat through the concrete containment pit and into the ground underneath." *United States v. Dico, Inc.*, No. 4-95-10289, at 10 (S.D. Iowa Feb. 14, 2000) (Ruling on Liability and Order Setting Hearing Date). Second, "Dico routinely dumped and spread sludge containing TCE residue directly on its property." *Id.* Third, small quantities of TCE leaked during the filling of storage drums with TCE. *Id.* Fourth, railcars delivering TCE to Dico dripped the chemical onto the soil while on Dico's property.

Id. Ample evidence in the record supports the District Court's finding that Dico released TCE and that it reached the soil.

1. TCE Leaks

The government presented evidence of numerous TCE leaks. William O'Brien, a former Dico employee, stated in his deposition testimony that in 1975 he discovered a significant leak in the degreaser. The degreaser was using an unusually large amount of TCE, and when O'Brien had the degreaser pulled out of its concrete containment pit for examination, he observed cracks in the bottom of the degreaser. Despite these cracks, he found no TCE pooled in the containment pit. Dep. of William J. O'Brien, July 12, 1995, at 56-57, 136-37. O'Brien described the absence of pooled TCE as an "amazing thing." *Id.* at 136. John Harold Strouf, a retired president of Dico, also testified to leaks in the degreaser. Strouf confirmed that Dico used at least two degreasers, one installed above ground and one installed in a concrete pit. Dep. of John Harold Strouf, Sept. 30, 1996, at 37. He testified that leaks from the degreaser tanks were caused by holes torn in the sides during the raising and lowering of the baskets containing parts to be degreased. *Id.* at 41-42.

Moreover, O'Brien testified that the company disposed of sludge containing TCE, collected from the bottom of the degreaser, by dumping the sludge on the ground about 100 feet from the production building and covering it with fill material and dirt. Dep. of William J. O'Brien at 27; *see also id.* at 40-41 (during 1950s TCE waste sludge from degreaser was dumped on property but in different location). Strouf testified that Dico took the TCE sludge from the bottom of the degreaser and used it as a dust suppressant on roadways

around the Dico facility. He stated that this practice was already established before he started working at Dico in 1960, and that as many as two fifty-five gallon barrels of sludge were removed from the company's degreasers each time they were cleaned. Dep. of John Harold Strouf at 44-45.

Finally, the record contains further evidence of leaks resulting from the chemical supply business that Dico ran from 1946 until 1980. TCE arrived at Dico's facility in railcars, from which Dico pumped the TCE into above-ground storage tanks and later into drums for resale to industrial users. The record shows that railcars delivering TCE to Dico sometimes leaked TCE onto the ground. Tr. at 266-68. Furthermore, the record reveals that some TCE leaked in the process of transferring the TCE from the storage tanks to smaller drums for commercial distribution. Arthur Dale Hilliard, Jr., a former Dico employee, testified that he witnessed drums leaking TCE in the drum storage area. Tr. at 263.

2. TCE Entered Soil

Dico further suggests that even if TCE and TCE sludge leaked or was dumped on its property, the District Court clearly erred in concluding that those TCE spills entered the soil. Despite this assertion, the record contains evidence of at least three sources of releases directly onto the soil: from railcars dripping TCE onto the ground, from dumping TCE sludge on the ground and covering it with fill material, and from spreading TCE as a dust suppressant directly onto the soil. *See supra* pt. III. A. 1. While Dico asserts that Abdul's testimony that any TCE spread or leaked

on top of the soil would only penetrate one foot deep is conclusive, other evidence contradicts his assertion. Robertson testified that TCE is heavier than water and it sinks through the soil unless impeded by some less-permeable barrier. He explained that TCE moves more quickly than water through the soil because it is less viscous. Tr. at 38. Coupled with Strouf's testimony regarding the quantity of sludge buried and spread on Dico's property, the District Court did not clearly err in concluding that releases of TCE on Dico's property penetrated the soil to a depth greater than one foot.

Dico also argues that the government offered no proof regarding how TCE moved into the soil through the walls of the concrete containment pit holding the degreaser or through the concrete slab in the drum storage area. Abdul testified that TCE does not move through concrete at any significant rate; Robertson testified that TCE penetrates concrete, both in its liquid and its vapor phases, because it is a heavy chemical and is less viscous than water. Robertson noted that some of the highest concentrations of contamination at the Site were found below these concrete slabs and that, in his experience, high concentrations of TCE are often found under concrete-lined containment pits. The expert testimony on this question of causation conflicted. Weighing the testimony of both experts, the District Court found Robertson's testimony more persuasive and credible. *United States v. Dico, Inc.*, No. 4-95-10289, at 17-20 (S.D. Iowa Feb. 14, 2000) (Ruling on Liability and Order Setting Hearing Date). Nothing Dico has argued convinces us that the District Court clearly erred in so concluding. *See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1218 n. 7 (3d Cir. 1993) (concluding that the court would "not disturb the district

court's decision to credit the reasonable testimony of one of two competing experts," particularly where their differences rest on a different interpretation of the same data). The record, taken as a whole, shows evidence in support of each basis for the District Court's conclusion that Dico released TCE on its property. We hold that the court did not clearly err in making this factual finding.

B.

Dico mounts a similar challenge to the court's finding that TCE migrated through the soil and into the groundwater on Dico's property. Dico argues that the District Court based its finding entirely on theories drawn from Robertson's testimony, and that because his testimony was unreliable and should have been excluded, no basis exists for the finding and it is clearly erroneous. As we previously concluded, the District Court did not err in admitting Robertson's testimony. *See supra* pt. II. A. Therefore, Dico's challenge also fails. In response to Dico's assertion that allowing the court to rely on such "circumstantial evidence of proximity" ignores our opinion in *Dico II*, we emphasize that our decision in that portion of this litigation merely reversed a grant of summary judgment. We found a material issue of fact, appropriate for resolution at trial, on the question of causation. *Dico II*, 136 F.3d at 579. We *did not* hold that, once the government had been put to its proof on this claim, such evidence could never form the basis of a judgment in favor of the EPA.

In any event, our review of the record reveals that the government presented evidence that TCE migrated through the soil into the groundwater, that Dico presented evidence to the contrary, and that the District Court found the

government's evidence more compelling. Given the evidence the District Court had before it, we cannot say the court clearly erred in finding that Dico's releases of TCE migrated into the groundwater and caused the contamination at issue.

IV.

Dico also challenges the District Court's grant of summary judgment to the government on the quantum of cleanup costs that would be awarded. The court awarded the government $4,129,426.67 in costs attributable to the EPA's efforts to remediate the Site's groundwater contamination. As part of these costs the court awarded $508,284.76 for indirect costs,[9] $730,060.74 for oversight costs,[10] and $370,453.57 for attorney fees and litigation costs. Dico contends that these costs are not recoverable as a matter of law under CERCLA and the District Court should not have allowed the government to recover any costs in these categories. We review this question of statutory interpretation de novo. *Braswell v. City of El Dorado*, 187 F.3d 954, 958 (8th Cir. 1999).

CERCLA's cost recovery provisions specifically allow the government to bring suit to recover "all costs of removal or remedial action incurred . . . [that are] not inconsistent

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[9] Indirect costs include "costs expended for the operation of the Superfund program to support site-specific cleanup activities." *United States v. Dico, Inc.*, No. 4-95-10289, at 2 (S.D. Iowa Mar. 28, 2000) (order granting summary judgment on response costs).

[10] Oversight costs encompass "costs incurred by the EPA in overseeing activities conducted by private parties other than EPA contractors." *Id.*

with the national contingency plan." 42 U.S.C. §9607(a)(1)(A). The statute defines "remedial action" as including

> such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

Id. §9601(24) (emphasis added). CERCLA further provides that "all such terms," including response, removal, and remedial action, "include enforcement activities related thereto." *Id.* §9601(25).

A.

Dico contends that the definitions found in CERCLA do not encompass recovery of the indirect and oversight costs incurred by the EPA in connection with the remedial activities undertaken at the Site. Dico relies on the Third Circuit's opinion in *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), to argue that we must apply the clear statement doctrine, as set forth in *National Cable Television*

Ass'n v. United States, 415 U.S. 336, 39 L. Ed. 2d 370, 94 S. Ct. 1146 (1974),[11] to decide whether 42 U.S.C. §9607(a) authorizes the recovery of oversight costs and indirect costs. In *Rohm*, the Third Circuit analyzed the EPA's request pursuant to CERCLA for recovery of costs incurred in "overseeing a hazardous waste cleanup performed and paid for by a private party." 2 F.3d at 1267. Both parties in *Rohm* agreed that the activities at issue fell under CERCLA's definition of removal activities, rather than remedial activities. *Id.* at 1271. Therefore, the *Rohm* court analyzed the recovery of oversight costs in the context of the 42 U.S.C. §9601(23) definition of "removal." The court concluded that the statute lacks the clear statement mandated by *National Cable*, and therefore oversight costs are not recoverable by the EPA. *Rohm*, 2 F.3d at 1278.

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[11] In *National Cable*, the Supreme Court reviewed fees that the Federal Communications Commission sought to impose upon community antenna television (CATV) systems. Pursuant to the Independent Offices Appropriation Act, the FCC sought to impose fees on CATV systems that would reimburse the FCC for both the direct and indirect costs of regulating the CATV industry. The Court struck down the FCC's proposed fee structure. Imposing such regulatory costs on the CATV systems would, in essence, allow the FCC to tax the systems. To avoid the constitutional dilemma presented by such an interpretation, the Court defined the charges imposed upon the systems as a "fee," which by definition must be an amount paid to the agency for some benefit to the recipient "not shared by other members of society," such as permission to conduct a particular trade. 415 U.S. at 341. The fees could be based only upon the FCC's direct costs, i.e., things that provided a direct benefit to individual cable systems. But because the "fees" proposed by the FCC included reimbursement for monies spent for the benefit of the general public, the Court remanded to the FCC to revise the proposed fee structure.

We respectfully disagree with the Third Circuit's analysis. The statutory scheme at issue in *National Cable* involved the imposition of user fees on parties regulated by the FCC for the benefit of conducting communications-related business. Conversely, CERCLA is a remedial statute designed to make parties responsible for introducing hazardous waste into the environment pay for cleaning up the messes they have created. *See United States v. Lowe*, 118 F.3d 399, 401-03 (5th Cir. 1997) (discussing remedial nature of CERCLA). The provisions allowing the EPA to recover costs are meant to make the guilty parties pay and thus are not like the user fees at issue in *National Cable*. *See Lowe*, 118 F.3d at 400-03 (holding the *National Cable* analysis to be inappropriate in the CERCLA context because CERCLA is a remedial statute; it does not impose user charges on a regulated industry, and therefore the clear statement doctrine does not apply to cost-restitution awards in CERCLA cases); Atl. *Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 568 (10th Cir. 1996) ("CERCLA response costs are not user fees or taxes . . . . EPA oversight costs are not fees or taxes levied against innocent members of a regulated industry to pay the EPA's general administrative costs, but part of the damages caused or contributed to by specific persons."); *cf. United States v. Hyundai Merch. Marine Co.*, 172 F.3d 1187, 1189-90 (9th Cir.), *cert. denied*, 528 U.S. 963, 145 L. Ed. 2d 310, 120 S. Ct. 397 (1999) (holding, in action brought pursuant to the Oil Pollution Act of 1990, that language allowing the United States to recover "removal costs" encompassed costs of monitoring Hyundai's private cleanup efforts; rejecting Hyundai's argument that *National Cable* should apply by pointing out that recovery of these types of costs does not constitute a tax). We are persuaded, as the Tenth Circuit held in *Atlantic Richfield*, that "*Rohm & Haas* departed

significantly from prior case law that had construed the cost recovery provisions of CERCLA broadly." 98 F.3d at 568. We decline to adopt the Third Circuit's narrow approach. *Accord United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 349 (5th Cir. 1998) ("The government's oversight costs in a responsible party clean-up are response costs under CERCLA.").

Furthermore, even if we were to apply the *National Cable* clear statement doctrine, we would conclude that its requirements are met with regard to CERCLA's cost recovery provisions for remedial (as opposed to removal) actions. As the court pointed out in *Atlantic Richfield*, the Third Circuit only addressed CERCLA's language defining *removal* actions under § 9601(23). CERCLA defines *remedial* actions more broadly to include "any *monitoring* reasonably required to assure that such actions protect the public health and welfare and the environment." 42 U.S.C. §9601(24) (emphasis added). This language provides the specific congressional delegation of authority to the EPA that the clear statement doctrine of *National Cable*, as interpreted in *Rohm & Haas*, seems to require. Thus, even under the more restrictive approach advocated by Dico, we would conclude that oversight and indirect costs are recoverable in remedial actions under CERCLA.

B.

Dico also contends that the definitions found in CERCLA do not encompass recovery of the government's attorney fees, and that even if attorney fees are authorized the government bears the burden of proving that the fees requested are reasonable. We reject Dico's challenge on both

grounds. First, the language of the statute provides that attorney fees are recoverable as response costs under *CERCLA*. *See* 42 U.S.C. §9601(25) (stating that the terms response, removal, and remedial action "include enforcement activities related thereto"); *United States v. Gurley*, 43 F.3d 1188, 1199-1200 (8th Cir. 1994), *cert. denied*, 516 U.S. 817, 133 L. Ed. 2d 33, 116 S. Ct. 73 (1995) (affirming award of attorney fees to government under 42 U.S.C. §9601(25) and §9607(a)(4)(B) for work done by EPA legal staff and Department of Justice attorneys).[12]

Second, we reject Dico's argument that the government bears the burden of proving that its requested attorney fees are reasonable. We specifically addressed this argument in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986) (*NEPACCO*), *cert. denied*, 484 U.S. 848, 98 L. Ed. 2d 102, 108 S. Ct. 146 (1987), and held that the party claiming that costs are unreasonable has the burden of proof. We examined the statutory cost-recovery language applicable to the government's request for reimbursement of costs, and noted that it provides that the "government may recover from responsible parties '*all costs* of removal or remedial action ... *not inconsistent* with the'" National Contingency Plan (NCP).

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[12] We note that the Supreme Court's decision in *Key Tronic Corp. v. United States* offers little guidance on the issue of the government's recovery of attorney fees as part of its "enforcement activities" under CERCLA. 511 U.S. 809, 819, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994) ("Though we offer no comment on the extent to which [enforcement activity] forms the basis for the Government's recovery of attorney's fees through §107, the term 'enforcement activity' is not sufficiently explicit to embody a private action under §107 to recover cleanup costs.").

NEPACCO, 810 F.2d at 747 (emphasis added) (quoting 42 U.S.C. §9607(a)(4)(A)). We concluded that this language created the conclusive presumption that all costs incurred by the government that are *not* inconsistent with the NCP are, in fact, reasonable costs. *Id.* at 748. Dico therefore bears the burden in this litigation of proving that the government's requested recovery costs, whether attorney fees or otherwise, are inconsistent with the NCP.[13] *See also Chromalloy Am. Corp.*, 158 F.3d at 352 n.3 ("The burden of proving inconsistency with the NCP rests with the responsible party."). Presumably, any attorney fees that were not reasonably incurred would be held inconsistent with the NCP (else there would appear to be no limiting principle to a claim by the government for attorney fees as part of CERCLA response costs), but the burden would be on the responsible party to show unreasonableness. Dico has not attempted to show that the fees requested are inconsistent with the NCP.

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[13] Dico argues that the Ninth Circuit's decision in *United States v. Chapman*, 146 F.3d 1166 (9th Cir. 1998), required the District Court to limit the government's attorney fees award to those fees reasonably, not actually, incurred. We note that the decision of the Ninth Circuit is not binding on this Court, and, though the decision reaches a result that we find attractive, we must respectfully reject that court's analysis of the CERCLA fee issue. The Ninth Circuit applied the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), to the award of fees under CERCLA. The facts of *Hensley* are quite distinguishable-the fee award at issue was determined under the prevailing-party provisions of 42 U.S.C. §1988. In this Circuit, we have not applied Hensley to an award of fees under CERCLA. CERCLA makes no mention of fee awards to "prevailing parties." Moreover, the Act's language indicates that fee awards, as with other response costs, must merely be consistent with the NCP.

We affirm the District Court's grant of summary judgment awarding the government a recovery of its costs incurred in connection with the cleanup of the Site and establishing the amount of that recovery.[14]

V.

Before this case went to trial, Dico moved to add two affirmative defenses to its answer. Dico sought to argue that the EPA's claim would "effect an unconstitutional taking of private property" in violation of the Takings Clause of the Fifth Amendment, and would "deprive Dico of property without due process of law" in violation of the Due Process Clause of the Fifth Amendment. In essence, Dico's proposed defenses challenge the retroactive application of CERCLA to Dico's activities. The United States moved under Federal Rule of Civil Procedure 12(f) to strike these defenses as foreclosed by our decision in *NEPACCO,* 810 F.2d at 726 (upholding the constitutionality of retroactive application of CERCLA under both the Due Process and Takings Clauses of the Fifth Amendment). The District Court granted the United States's motion. We review for an abuse of discretion. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Coop.*, 2001 U.S. App. LEXIS 16989, No. 00-2012, 2001 WL 856259, at *5 (8th Cir. July 31, 2001); *see also Stanbury Law Firm v. IRS,* 221 F.3d 1059, 1063 (8th Cir. 2000) (noting that district courts enjoy "liberal discretion" under Rule 12(f)).

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[14] Furthermore, we find Dico's argument that a material issue of fact remains regarding the calculation of attorney fees, based upon pending litigation against the Department of Justice, to be completely without merit.

Dico argues that the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998) (addressing Fifth Amendment challenge to Coal Industry Retiree Health Benefit Act of 1992), supersedes our due process and takings holdings in *NEPACCO*. We reject Dico's argument for two reasons. First, no single Fifth Amendment rationale commanded a majority of the Court's votes in *Eastern*. Four Justices voted to strike down the statute as unconstitutional based upon a Takings Clause analysis. 524 U.S. at 537. The fifth vote for striking down the statute rejected the takings analysis and held that the statute violated the Due Process Clause. *Id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Second, the background and purpose of the Coal Industry Retiree Health Benefit Act differs greatly from that of CERCLA; Congress intended CERCLA to apply retroactively and acted purposefully to allocate the cost of hazardous waste cleanups sites "to those who were responsible for creating the sites." *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) (holding that *Eastern* has no precedential effect because no majority agreed on a rationale for striking down the statute, and also holding that Eastern has no effect on the constitutionality of retroactively applying CERCLA's provisions).

In sum, we are unpersuaded by Dico's challenge to CERCLA on Fifth Amendment grounds. We previously resolved the constitutionality of CERCLA's retroactive application in *NEPACCO*, and we are unpersuaded that the Supreme Court's decision in *Eastern* undermines *NEPACCO*. The District Court did not abuse its discretion in granting the government's motion to strike these constitutional defenses

from Dico's answer. *Cf. United States v. Winnebago Tribe,* 542 F.2d 1002, 1007 (8th Cir. 1976) (upholding district court's striking of defense where federal statute clearly authorized appellee's activities).

VI.

In summary, we reject Dico's challenges to the District Court's evidentiary rulings and to its factual findings on causation regarding Dico's liability for TCE contamination at the Site. The District Court appropriately granted summary judgment on the government's request for its costs incurred in connection with the cleanup at Dico's facility, and did not err in striking Dico's constitutional defenses. The judgment of the District Court is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CASE NO.: 4-95-cv-10289

[Filed March 29, 2000]

USA	)
Plaintiff	)
v.	)
	)
DICO, INC.	)
Defendant	)
	)

JUDGMENT IN CIVIL CASE

_____ **JURY VERDICT**. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **DECISION BY COURT**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Judgment is entered in favor of plaintiff, United States and against defendant, Dico Inc. in the amount of $4,129,426.67. It is

Further Ordered that the United States' motion in limine for admission of a cost summary and for a ruling on the admissibility of the underlying documents are Granted. Dico's motion in limine precluding evidence on oversight costs, indirect costs and attorney fees is Denied. The United States motion for protective order to preclude testimony of Department of Justice Attorneys is Denied as moot.

March 29, 2000
Date

/s/_____
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 4-95-10289

[Filed March 28, 2000]

UNITED STATES OF AMERICA,	)
Plaintiff,	)
vs.	)
	)
DICO, INCORPORATED,	)
Defendant.	)
	)

ORDER

The Court has before it the United States' second motion for summary judgment with respect to response costs, filed July 9, 1999. Dico, Incorporated ("Dico") resisted both motions on July 29, 1999, and the United States filed a reply on August 19, 1999. In an order entered September 16, 1999, this Court bifurcated the liability and response costs issues, and deferred ruling on the United States' motion for response costs pending a resolution of the liability portion of the trial.

Following a bench trial on the liability portion of the trial, on February 11, 2000, the Court entered an order concluding that Dico was liable for response costs the United States incurred in connection with OU-1 at the Des Moines, Iowa TCE Site. The Court held a supplemental telephonic hearing on February 28, 2000 to discuss issues remaining on the United States' motion for summary judgment on response costs. The parties submitted supplemental memoranda on March 10, 2000 and the motion is now considered fully submitted.

I. BACKGROUND

As discussed in prior orders of this Court, the EPA designated its actions pertaining to the groundwater contamination at the Des Moines TCE Site as OU-1. It further selected a remedy calling for the installation and operation of a system of wells to extract the contaminated water, followed by treatment to remove the TCE. Rather than implementing the remedy itself, on July 21, 1986, the EPA issued an order pursuant to section 106 of CERCLA, 42 U.S.C. §9606, directing Dico to install and operate the groundwater extraction system. To date, Dico has performed and paid over $7.7 million to extract and treat the water.

In its present motion for summary judgment, the United States seeks from Dico an additional $4,129,426.67 in governmental response costs attributed to OU-1. Of this amount, $508,284.76 is for indirect costs, which are costs expended for the operation of the Superfund program to support site-specific cleanup activities. The sum of $370,453.57 is attributed to attorneys' fees and litigation costs incurred by the Department of Justice, and "not more than"

$730,060.74 is categorized as oversight costs, or costs incurred by the EPA in overseeing activities conducted by private parties other than EPA contractors. Also included in the total amount sought are intramural costs, or EPA employee salary and travel costs; extramural costs, which are comprised of third-party contract costs, state cooperative agreement costs and miscellaneous costs; and prejudgment interest. A breakdown of costs claimed by the United States is as follows:

Costs Directly Recorded by EPA for OU-1 as of November 30, 1988	$2,679,743.30
Additional OU-1 Costs Incurred Between March 26, 1988 and October 1, 1994	$ 101,540.12
Enforcement Costs	$ 370,453.57
Pre-Judgment Interest	$ 977,689.68
Total	$4,129,426.67

The $4,129,426.6-7 requested by the United States is a decrease from the $4,378,110.66 claimed with respect to its first motion for summary judgment.

The EPA's cost figures are derived in part from its Integrated Financial Management System ("IFMS"), which records costs incurred by the EPA and its contractors at various Superfund sites around the country under Superfund Spill Site Identifier numbers assigned by the EPA. The IFMS

can also print out "SCORES" reports that itemize costs incurred under individual Spill Site Identifier numbers for a given period of time. In addition, the EPA alleges that it collects and maintains independent and complete documentation of its costs for individual Superfund sites.

Following the Eighth Circuit's remand, the United States retained certified public accountant Wiley Wright to independently review the cost documentation for the Site. The United States sought Mr. Wright's evaluation in part due to a 1995 report issued by the General Accounting Office ("GAO") which found that EPA employees sometimes enter inaccurate or incomplete cost data into the IFMS system. According to the United States, to rectify any inaccuracies in the IFMS reports, Mr. Wright reviewed the EPA's cost documents for the Site and for OU-1 in particular to verify costs independently of the IFMS.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States,* 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for controversy, *Jewson v. Mayo Clinic,* 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material.... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Whether Summary Judgment is Appropriate in the Present Case

CERLCA §107(a)(4)(A) provides that the government may recover from responsible parties "all costs of removal or remedial action...not inconsistent with the national contingency plan." 42 U.S.C. §9607(a)(4)(A). As set forth above, in support of its present motion the United States has proffered a detailed report submitted by its expert Wiley Wright outlining the costs according to category allegedly incurred by the United States with respect to OU-1, as well as additional contractor invoices submitted subsequent to Mr. Wright's report. The Court finds this evidence sufficient to constitute a prima facie case that the United States incurred response costs totaling $4,129,426.67 with regard to OU-1.[1]

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[1] In lieu of submitting thousands of individual government documents maintained by the EPA and Justice Department with regard to OU-1 costs, the United States moved in limine pursuant to Rule 1006 of the Federal Rules of Evidence to admit a cost summary prepared by its expert, Wiley Wright. Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or

> calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006. In the present case, Dico does not question whether the documents at issue meet the formal requirements of Rule 1006, *i.e.* are voluminous and have been made available to its representatives for examination. Rather, it challenges the admissibility of the underlying documents. Specifically, it contends the cost summary is not a true and accurate summary of the underlying documents and that the underlying documents had not been authenticated, and constitute inadmissible hearsay. The former argument is based on Dico's general contention that the IFMS system used by the EPA lacks integrity. This argument is addressed in the body of this Order.

As to whether the documents have been properly authenticated, the Court agrees with the United States that it is impractical to expect the United States to maintain individual affidavits for every document prepared by a private contractor. The Court finds the affidavits submitted by the appropriate government custodian of records to be an acceptable form of authentication. *See* Declarations of Jolleen Werst, David Piet and Robert Bruffy.

Dico also contends many of the documents do not fall within the public records or business records exceptions to the hearsay doctrine due to the fact no custodian or other witness has stated that the private contractor recorded the information in the ordinary course of business. This Court disagrees. Again, it is wholly impractical to expect an EPA employee to verify each and every document submitted by an independent contractor. The Court further notes that at least two courts have accepted EPA cost summaries at trial. *See Unites States v. Gurley Refining Co.*, 788 F. Supp. 1473 (E.D. Ark. 1992); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984). Because the Court is satisfied Mr. Wright has made an independent review of the EPA records and does not wholly rely on IFMS in deriving his cost summary, Dico's attempt to distinguish these cases on the basis that they were decided before the 1995 GAO Report challenging the IFMS system is unpersuasive.

Lastly, Dico objects to the summary as it pertains to oversight costs, indirect costs and attorneys' fees. As stated in the

Once the government has established its prima facie case, the burden shifts to the responsible party--in this case, Dico--"to prove the response costs were inconsistent with the [national contingency plan], not cost-effective or unnecessary." *United States v. Northeastern Pharmaceutical & Chem. Co., Inc. ("NEPACCO")*, 810 F.2d 726, 747 (8th Cir. 1986). As held by the Tenth Circuit in *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992):

> The [national contingency plan, or "NCP"] does assure that remedial action measures are cost-effective by requiring the government to consider cost when selecting remedial alternatives, 40 C.F.R2 §300.68(g)(1), and by requiring the government to select "a cost-effective remedial alternative." *Id.* §300.68(1). However, *a challenge that an individual cost is excessive or unreasonable does not demonstrate inconsistency with either of these NCP provisions. Rather, to survive summary judgment by demonstrating inconsistency with section 300.68(g)(1) or 300.68(i) of the NCP, a defendant must show that the government acted arbitrarily and capriciously in failing to consider cost, or in selecting a remedial alternative that is not cost-effective.*

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body of this Order, this argument has previously been addressed by the Court and will not be revisited at this juncture. The Court therefore finds the United States' motion in limine for admission of a cost summary and for a ruling on the admissibility of the underlying documents is appropriately GRANTED.

(Emphasis added).

In resisting the United States' motion, Dico claims: 1) that oversight costs, indirect costs and attorneys' fees are not recoverable under section 107 as a matter of law; and 2) that the data used by the United States lacks integrity and cannot be relied on to establish costs as a matter of law. Dico's first argument was thoroughly evaluated by the Court in its April 1, 1997 order. Absent a showing by Dico that the law has changed since April 1997, the Court declines to revisit its ruling that indirect costs, oversight costs and attorneys' fees are recoverable under 42 U.S.C. §9607(a)(4)(A).[2] *See, e.g., Little Earth of United Tribes v. HUD,* 807 F.2d 1433, 1440 (8th Cir. 1986) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (internal citation omitted).

Dico also claims that the data used by the United States cannot be relied upon to establish costs as a matter of law. In support of this argument, Dico points to the fact the United States sought $4,378,100.66 in its first motion for summary judgment, and seeks only $4,129,426.67 in its present motion. In addition, the United States' expert Mr. Wright concluded in his March 5, 1999 report that the total response costs for OU-1 were only $3,722,893.31. According

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[2] Although the Eighth Circuit set aside the money judgment entered by this Court "in its entirety," it expressly reserved ruling on whether the EPA may recover indirect and oversight costs. *United States v. Dico, Inc.*, 136 F.3d 572, 579 (8th Cir. 1998). Dico did not appeal this Court's ruling that the United States is entitled to recover attorneys' fees.

to Dico, these discrepancies necessarily create a material issue of fact as to the costs actually incurred.

This Court disagrees. Although the amount sought by the United States with regard to the first summary judgment motion clearly is greater than the amount it presently seeks, the United States has provided a suitable explanation for the discrepancy. According to the United States, its first summary judgment motion was tied to cost figures derived exclusively from the EPA's IFMS. In reviewing these figures following remand, Mr. Wright found the individual documents did not support all of the EPA's claimed cost, and therefore produced the lower figure of $3,722,893.31. After Mr. Wright's report was complete, and before the United States submitted its present motion, the EPA produced additional contractor lab invoices to Mr. Wright documenting an additional $262,325.15 in costs. The United States added these new costs, as well as an additional $144,208.21 in prejudgment interest to reach the current amount of $4,129,426.67.

The Court notes Dico has not challenged Mr. Wright's actual calculations. Other than its general challenge to the recoverability of attorneys' fees, indirect costs and oversight costs, Dico has not provided any evidence as to particular expenditures it believes should be disallowed, or provided expert witness testimony or reports to counter Mr. Wright's summary. Even assuming Dico had provided such evidence, however, to survive summary judgment Dico must be able to show the United States acted arbitrarily and capriciously in choosing the remedy that generated the particular cost at issue. Dico's general challenge to Mr. Wright's report is therefore, unpersuasive to the Court. *Hardage,* 982 F.2d at

1443.[3]

Dico also claims there exists a material issue of fact regarding the reliability and integrity of the EPA's cost data and accounting system. Specifically, Dico cites to the 1995 GAO report indicating the Superfund program is a "high risk area," and "lacks integrity of payroll data and adequate system development and user documentation." *See* Exhibit E to Dico's Memorandum on Response Costs, at 5. Again, however, the 1995 GAO report was one of the reasons the United States retained Mr. Wright to personally review the IFMS figures. Because Dico has failed to produce admissible evidence to counter Mr. Wright's calculations, the Court sees no reason to deny summary judgment on this basis.

Next, Dico claims fact issues exist regarding Dico's claim that the United States' actions were arbitrary and capricious in assigning responsibility for the oversight and response costs only to Dico. This is simply a reprisal of arguments raised during the liability portion of the action, and need not be revisited at the present time.[4]

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[3] In essence, Dico is attempting to shift the burden of proof back to the government on this issue. The Court is unaware of any statute or regulation requiring that the EPA's cost reports be fully audited prior to submission in a cost recovery action.

[4] In *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 905 (5th Cir. 1993), the sole case relied on by Dico in support of this argument, the Court found the EPA's decision to require an alternate water supply system to be installed was arbitrary and capricious, based on the fact the EPA made no attempt to determine whether anyone used or intended to use the alternative water system. This finding is entirely consistent with the Tenth Circuit's language in *Hardage*, that the EPA's failure to consider cost-effectiveness of a remedy is inconsistent with the national

Dico also claims that the EPA's methods for calculating and allocating its costs are arbitrary and capricious, noting that, in calculating and assigning oversight costs to OU-1, the EPA's Glenn Curtis relied on his personal familiarity with activities at the Site, and his review of Site records. This argument was addressed by the Court in its first summary judgment order, and again, Dico has failed to provide evidence that Mr. Curtis' figures are inaccurate or inconsistent with the national contingency plan. Accordingly, Dico has failed to fulfill its statutory burden of proof on this issue. *See* 42 U.S.C. §9607(a)(4)(A) (costs are "conclusively presumed" to be consistent with the national contingency plan unless proven otherwise by defendant). *See also United States v. NEPACCO,* 810 F.2d at 747 (citing statutory section).

Finally, in a supplemental pleading based on a pending class action lawsuit filed by Department of Justice Attorneys, Dico contends that the Justice Department has maintained two sets of attorney time records, and accordingly, may have overcalculated its attorney fees with regard to OU-1. Other than relying on the allegations in the lawsuit, however, Dico has produced no evidence suggesting Mr. Wright's calculations of attorneys' fees in the present action is inaccurate. The Court is satisfied Mr. Wright's calculations were based on actual hours worked by each particular

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contingency plan. *Hardage,* 982 F.2d at 1443. There is a marked difference, however, between failing to consider cost-effectiveness of a remedy, and failing to properly allocate *responsibility* for the remedy. The latter argument does not tend to show inconsistency with the national contingency plan, which is necessary to defeat the present motion.

attorney. *See* Expert Accounting Report of Wiley R. Wright, III, CPA at 10, Exhibit 4 to United States Memorandum in Support of U.S. Motion for Summary Judment on Response Costs.

III. CONCLUSION

For the reasons outlined above, the United States' motion for summary judgment is GRANTED. The Clerk of Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $4,129,426.67.[5]

IT IS FURTHER ORDERED that the United States' motion in limine for admission of a cost summary and for a ruling on the admissibility of the underlying documents are GRANTED. Dico's motion in limine precluding evidence on oversight costs, indirect costs and attorney fees is DENIED. The United States motion for protective order to preclude testimony of Department of Justice Attorneys is DENIED as

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[5] The Court notes that during the February 28, 2000 telephone hearing the Court questioned the parties as to whether the United States was entitled to recover attorneys' fees and costs pertaining to the first summary judgment motion and subsequent appeal. After reviewing the applicable case law, however, the Court is satisfied the United States is entitled to recover all fees and costs incurred, even those pertaining to unsuccessful, intermediate motion practice. *See, e.g., Jenkins v. Missouri,* 127 F.3d 709, 714 (8th Cir. 1997) (in determining whether prevailing party was entitled to fees under the Civil Rights Attorney's Fees Awards Act of 1976, court stated: "[i]t is generally true that status as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how a party fares on each motion along the way") (citing *Commissioner, INS v. Jean,* 496 U.S. 154-161-62 (1990)).

moot.

IT IS ORDERED.

Dated this 25th day of March, 2000.

/s/_____
RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 4-95-10289

[Filed February 14, 2000]

UNITED STATES OF AMERICA, *Plaintiff*,	)
vs.	)
DICO, INCORPORATED, *Defendant*.	)

RULING ON LIABILITY AND ORDER SETTING HEARING DATE

The above-captioned action is before the Court for ruling on the issue of liability only, following a bench trial held October 12-19, 1999. The parties filed proposed findings of fact and final argument on December 14, 1999, and the matter is now considered fully submitted.

ADMISSIBILITY OF CHALLENGED EVIDENCE AND EXHIBITS

As an initial matter, the Court notes each party has raised challenges to numerous exhibits and evidence submitted by the other party. The Court has provided formal rulings of admissibility in the body of the text, below, regarding contested evidence it in fact considered in developing its ultimate conclusion on liability. In the interest of judicial economy, the Court will not issue formal rulings regarding exhibits or evidence not pertinent to its present findings of fact and conclusion.

FINDINGS OF FACT

The Court finds ihe following facts to have been proven by a preponderance of the evidence:

A. Dico's Use and Release of TCE

1. Dico, Inc. ("Dico") and its corporate predecessors manufactured a variety of metal industrial items, including metal wheels, at its property. *(Order on Final Pretrial Conference ("Pretrial Order") at 2, ¶ 2).*

2. Beginning in the 1940s, and continuing until at least 1979, Dico's manufacturing process included cleaning metal parts in solvent degreasers that used commercial solvents comprised primarily of trichloroethylene ("TCE"). *Trial Transcript ("Tr. Tr.") 228; Deposition of William J. O'Brien ("O'Brien Dep."), Dico, Inc. v. Liberty Mut. Ins. Co., at 24:19-25:12.*

3. Over time, Dico used several TCE degreasing vats in its production operations, including a large "underground" degreasing vat located in a concrete containment pit inside Dico's main production building. *Tr. Tr. 236; 240.*

4. At least every four to six weeks, and sometimes every two to three weeks, Dico replaced the TCE in its degreasing vat with two or three 55-gallon drums of TCE received from Dico's chemical supply division. *Tr. Tr. 233; Deposition of John Harold Strouf ("Strouf Dep."), at 39:22-24, 40:5-11.*

5. Before the TCE was poured into the degreasing vat, the drums containing TCE sat on a concrete slab outside the western wall of Dico's main production building. *Tr. Tr. 245: 6-8.* After filling the degreaser, Dico employees placed the empty drums on the same concrete slab for pick-up. *Tr. Tr. 244-45.*

6. Periodically, Dico's underground degreasing vat leaked unknown amounts of TCE through holes in the degreasing vat. *Strouf Dep. at 41:24-43:15. O'Brien Dep. at 56:9-57:19.*

7. In 1973, William O'Brien, Dico's maintenance superintendant, noticed that Dico was using excessive amounts of TCE in its degreasing vat, and ordered the degreasing vat lifted out of its concrete pit. *O'Brien Dep. at 134:21-135:1.*

8. Upon lifting the degreasing vat from the pit, Mr. O'Brien discovered that the vat had rusted and/or cracked. *O'Brien Dep. at 134:21-135:1.*

9. The reason the vat had been requiring so much TCE was that TCE had been escaping the vat through a leak in the bottom of it. *O'Brien Dep. at 135:7.*

10. Mr. O'Brien testified that after lifting the vat out of the concrete pit, he was "amazed" to find there were no pools of TCE or TCE sludge in the pit. Although he did not recall looking specifically for cracks in the concrete, he suspected TCE escaped from the concrete pit. *O 'Brien Dep. at 136:20-137:11.*

11. Based on Mr. O'Brien's testimony, and the lack of any evidence to controvert his testimony, the Court finds that an unknown quantity of TCE escaped over time from the concrete containment pit.

12. After discovering the leakage, Dico repaired and/or replaced the vat immediately. *O'Brien Dep. at 137:8-16.*

13. Dico did *not* replace, reinforce or otherwise change the concrete *pit* before temporarily reinstalling the degreasing vat in the same location. *O'Brien Dep. at 137:17-22.*

14. Shortly after this incident, the degreasing vat was moved to an above-ground location. *O'Brien Dep. at 138:1-2.*

15. Based on Mr. O'Brien's testimony, and the lack of any evidence to controvert his testimony, the Court finds that an unknown quantity of TCE continued to escape from the pit until the vat was moved to its above-ground location.

16. Through normal use of the degreasing vat, sludge formed and accumulated in the degreasing vat. *O'Brien Dep.*

at 26:15-23; Strouf Dep., at 44: 14-24.

17. The accumulated sludge contained TCE, Dichloroethylene ("DCE"), and other volatile organic compounds ("VOCs"). *Plaintiff's Exh. 1 at L000053-L000056 and L000104.* The portions of this exhibit relied upon by the Court do not contain inadmissible conclusions, speculation or hearsay. Defendant's objection to this exhibit is therefore overruled with regard to the pages cited by the Court in this paragraph.

18. The sludge was pumped into 55-gallon drums, and stored on a concrete slab on the west side of the main Dico production building to await use as a dust suppressor on Dico's property. *Strouf Dep. at 102:8-17.*

19. Until the 1970s, as many as two dozen barrels would accumulate year-round until Dico spread the sludge on its property. This would occur two to three times, during the summer. *Defendant Dico Inc.'s Proposed Findings of Fact and Conclusions of Law, ("Dico's Findings of Fact"), at 2 ¶ 15; StroufDep., at 103:7-20, 105:19-106:1.*

20. In addition to dust-control applications of sludge, Dico also disposed of TCE-contaminated sludge from its degreasers directly on the ground, approximately 100 feet from Dico's production building, occasionally combining it with fill material and covering it up with dirt. *Tr. Tr. 230; O'Brien Dep. at 26:16-27:19, 40: 10-23, 44:5-12, 95:22-96:17, and 155:16-156:4.*

21. Drums were filled with TCE sludge on top of a concrete slab. *Tr. Tr. 263.*

22. An unknown quantity of TCE leaked during the drum filling process. *Tr. Tr. 263-64.*

23. Dico employees would attempt to clean-up the leak as soon as it was noticed, and would pump the TCE into a good drum. *Tr. Tr. 263-64.*

24. Between the 1950s and 1970s, Dico supplied TCE to other industrial users, at least twenty of which were located in close proximity to the Dico facility. *Pretrial Order at 2, ¶ 3.; Tr. Tr. 258-59.*

25. As part of its chemical supply business, Dico received on site approximately 120,000 gallons per year of TCE from 1946 until 1980. Dico repackaged and resold approximately 96 percent of the TCE to other customers and used approximately 4 percent of the TCE in its operations. *Plaintiff's Exh. 36 at L005332-33.* The portions of this exhibit relied upon by the Court do not contain inadmissible conclusions, speculation or hearsay. Defendant's objection to this exhibit is therefore overruled with regard to the pages cited by the Court in this paragraph.

26. Several times per year, solvent containing TCE was delivered to the Dico property in rail cars holding eight or ten thousand gallons of solvent. *Pretrial Order at 2, ¶ 4.*

27. Using an above ground pipeline, Dico transferred the TCE from the rail cars to a storage tank located above bare ground off the south east corner of the main production building. *Dico's Findings of Fact at 3, ¶ 25: Pretrial Order at 2, ¶ 4; Tr. Tr. 280.*

28. Railcars occasionally dripped TCE from their spouts upon arrival at Dico's facility, but Dico employees acted immediately to stop the dripping. *Tr. Tr. 266-67.*

29. Dico did not own or operate any of the railcars. *Tr. Tr. 268.*

30. Beginning around 1975, Dico also received bulk shipments of TCE in four thousand gallon tank trucks. *Pretrial Order, at 3, ¶ 5.*

31. Drums were picked up by Dico's customers in the "truck loading area," who returned them to the same location. *Plaintiff's Exh. 32 at L006658-59.* The portions of this exhibit relied upon by the Court do not contain inadmissible conclusions, speculation or hearsay. Defendant's objection to this exhibit is therefore overruled with regard to the pages cited by the Court in this paragraph

32. Dico did not conduct any drum cleaning on its property, but employed the services of an off-site company. *Tr. Tr. 265-66.*

B. The EPA's Discovery of Contamination and Investigation of Sources

33. In 1974, trichloroethylene ("TCE") was found in the Des Moines Water Works ("DMWW") public drinking water supply. *Pretrial Order, at 2, ¶ 6; Plaintiff's Trial Exhibit 1).*

34. The City of Des Moines, the DMWW and the Environmental Protection Agency ("EPA") conducted remedial investigations to determine where the contamination

was entering the water supply. *Tr. Tr. 167.*

35. The source of the contamination was traced to water drawn into the north section, or gallery, of underground wells maintained by the DMWW. The DMWW was located west of the Dico property, separated from Dico by the Raccoon River. *Pretrial Order at 2, ¶ 6.; Tr. Tr. 167.*

36. Because of the proximity to the DMWW, the EPA proposed and ended up placing the Des Moines TCE Site ("the Site") on a national priority list. *Tr. Tr. 168.*

37. Early sampling conducted by the DMWW revealed high concentrations of TCE in a production well on Dico's property, which prompted the EPA to focus its investigation on the Dico property. *Tr. Tr. 168.*

38. The EPA divided its investigation and response activities into four phases, or operable units. *Tr. Tr. 169.*

39. Operable Unit 1 ("OU-1") focused on preventing the contamination from entering the drinking water supply. *Tr. Tr. 169-70.*

40. OU-2 focused on the sources of contamination in the soil on the Dico property. *Tr. Tr. 170.* Upon completion of the OU-2 remediation study, more than 100 sampling points had been investigated on and around the Site, including wells, soil boring sites, surface-water sampling points and sediment sampling points. *Tr. Tr. 37.*

41. OU-3 investigated sources of contamination north of the Dico property. *Tr. Tr. 172.*

42. OU-4 addressed pesticide and herbicide contamination found on the Dico property. *Tr. Tr. 176.*

43. Following completion of an initial feasibility study at the Site, the Regional Administrator of EPA Region 7, which includes the Des Moines, Iowa, area, signed a Record of Decision ("ROD") selecting a remedial action for OU-1 in July 1986. *Pretrial Order at 3, ¶ 10.*

44. On July 21, 1986, EPA issued an Administrative Order requiring Dico to implement the remedy selected in the OU-1 ROD. *Pretrial Order at 3, ¶ 11.*

45. Dico was the only recipient of such an order regarding the Site. *Pretrial Order at 3, ¶ 12.*

46. Dico hired Eckenfelder, Inc., based in Mahwah New Jersey, to implement the OU-1 remedy selected by the EPA, and to conduct an OU-1 Remedial Investigation "to further define and evaluate the nature and extent of contamination" at the Site. *Plaintiff's Exh. 32 at L006653.* The portions of this exhibit relied upon by the Court do not contain inadmissible conclusions, speculation or hearsay. Defendant's objection to this exhibit is therefore overruled with regard to the page cited by the Court in this paragraph

47. The present litigation involves costs for completion of OU-1 only. Costs related to OU-2, OU-3 and OU-4 are not at issue in the present litigation. *Pretrial Order at 3, ¶ 13.*

SCIENTIFIC DATA AND EXPERT TESTIMONY

48. TCE, DCE and vinyl chloride were the three most common chemicals of concern ("COCs") found in the Dico monitoring wells during the OU-1 remedial investigation. *Plaintiff's Exh. 4 at L000417-22.* The portions of this exhibit relied upon by the Court do not contain inadmissible conclusions, speculation or hearsay. Defendant's objection to this exhibit is therefore overruled with regard to the pages cited by the Court in this paragraph.

49. Vinyl chloride and DCE both are degradation products of TCE. *Plaintiff's Exh. 83 at L004050.* Defendant's relevance objection to this exhibit is overruled. The admissibility of Mr. Robertson's trial testimony is addressed below.

50. Once introduced into the soil, a small amount of TCE will dissolve in the soil water, a small amount will evaporate, and the majority will not dissolve, but maintain a separate, nonaqueous phase liquid, known as DNAPL, or dense non-aqueous phase liquid. DNAPL flows more easily than water and will move more quickly through soil than water. *Tr. Tr. 38-40.*

51. TCE weighs fifty (50) percent more than water. *Tr. Tr. 43.*

52. TCE in its DNAPL form is driven downward in the soil by gravity. Once in the ground, TCE leaves a "trail" of residual contamination in the soil. *Tr. Tr. 38.*

53. The relative abundance of DCE, a TCE degradation product, compared to TCE in groundwater samplings generally increases along with the distance away from the Dico source areas. *Plaintiff's Exh. 83 at L004046, Plaintiff's Exh. 4 at L000419-20.* The portions of plaintiff's exhibit 4 relied upon by the Court do not contain inadmissible conclusions. speculation or hearsay. Defendant's objection to plaintiff's exhibit 4 is therefore overruled with regard to the pages cited by the Court in this paragraph.

54. DCE may move as much as two to four times faster through groundwater than TCE. *Plaintiff's Exh. 83 at L004050.*

55. The above evidence supports Mr. Robertson's testimony that the most likely cause of groundwater contamination is something released near the surface that travels primarily vertically through the soil into the groundwater, and degrades over time. *Tr. Tr. 38; Plaintiff's Exh. 83 at L004045.*

56. Prior to remediation in 1984, TCE concentrations identified in groundwater sampling data revealed that the greatest contamination zones were near the major Dico TCE use areas-primarily west of the major production building, truck loading area and rail car unloading areas. *Plaintiff's Exhibit 4 at L006830, L000419.* The portions of this exhibit relied upon by the Court do not contain inadmissible conclusions, speculation or hearsay. Defendant's objection to this exhibit is therefore overruled with regard to the pages cited by the Court in this paragraph. *See also Plaintiff's Exh. 83 at L004043-45, L004051.*

57. The high TCE concentration zones changed little between 1985 and 1993, following remediation. *Appendix C to Plaintiff's Exh. 27.* Defendant's objections to this exhibit are overruled. *See also Plaintiff's Exh. 83 at L004045, L004052.*

58. The above evidence supports Mr. Robertson's opinion that Dico's use, storage, transfer and/or handling of TCE caused the majority of OU-1 contamination. *Plaintiff's Exh. 83 at L004045.*

59. During OU-3, the EPA took a number of different soil and water samples from areas north and west of the Dico property, but could not find a link between contamination north of Dico and contamination extracted from beneath the Dico property. *Tr. Tr. 176.*

60. Specifically, the soil gas and water samples taken during OU-3 at the former Solar Aircraft facility and the Meredith Publishing Company did not show significant TCE or COC concentrations. *Tr. Tr. 217-19; Plaintiff's Exh. 53 at DB013875-77, DB013925-26.*

61. The same is true of samples taken at the Metropolitan Transit Authority ("MTA") facility and the Wallace Homestead Properties. *Plaintiff's Exh. 53 at DB013926.*

62. No TCE, DCE or vinyl chloride was found in soil borings taken to determine whether contamination had migrated to the Dico property via the Ingersoll Run storm sewer system. *Plaintiff's Exh. 53 at DB13926.*

63. The Martin Luther King Expressway ("MLKE") project is located more than one mile north of the Dico property. *Plaintiff's Exh. 84.*

64. Although relatively large concentrations of perchloroethene ("PCE") and TCE were identified at the center of the MLKE contaminant area, those concentrations decrease markedly within two blocks south of the highest area of concentration. *Defendant's Exh. 156-C (introduced at trial).*

65. There is no evidence of COCs identified in significant levels between the MLKE project area and the Dico property.

66. The record contains no direct evidence of discharges of COCs into the sanitary sewers in the MLKE project area. *Tr. Tr. 436.*

67. The bypass of the Ingersoll Run that used to enter the Dico property was blocked in the late 1960s. *See Tr. Tr. 436 (conceding flow from Ingersoll Run has been diverted from Dico property).*

68. There is no persuasive evidence that contaminants migrated onto the Dico property via any other conduit.

69. William George Soukup testified it was his opinion that the primary source of contamination of the south plume was Dico's degreasing and drum cleaning operations. *Deposition of George William Soukup ("Soukup Deposition") at 8:20 - 9:3.* Soukup was the expert hired by Dico in litigation Dico filed against its insurance companies seeking indemnification for monies Dico expended cleaning up the

Site.

70. The government's expert witness, John Robertson, is well-qualified to testify in the present litigation and presented logical, well-supported theories of liability.

71. Dico's expert witness, Abdul, Abdul, Ph.D., also is well-qualified to testify on matters relevant to hydrogeology. His theories of liability are far less credible to the Court, however, due to his inability to establish a hydraulic connection between the MLKE project area and the Dico property.

APPLICABLE LAW AND DISCUSSION

I. Whether Dico's Disposal of Hazardous Materials Caused Groundwater Contamination that Led to Response Costs that the EPA Incurred in Connection with OU-1

A. Elements of CERCLA Liability

The United States filed the present action against Dico pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA"), 42 U.S.C §9607(a), to recover funds it spent remediating groundwater contamination in the Des Moines, Iowa drinking water. To establish CERCLA liability against a particular defendant under §9607(a), the United States must first establish by a preponderance of the evidence that Dico was: "(1) an owner or operator (2) at a time when TCE was released." *United States v. Dico, Inc.*, 136 F.3d 572, 578 (8th Cir. 1998) (citing *ControlData Corp. v. S.C.S.C. Corp.*, 53

F.3d 930, 934 (8th Cir. 1995)). Dico does not seriously dispute either of these elements. *Id.* Additionally, however, the "'plaintiff must establish a causal nexus between that release and the incurrence of response costs," as well as prove "that the costs [sought to be recovered by the EPA] were necessary and consistent with the national contingency plan." *Id.* (citing *Control Data Corp.*, 53 F.3d at 934-35). The third element is the focus of the present order on liability. The fourth element will be addressed, if necessary, in conjunction with the United States' motion for summary judgment on response costs.

If the liability requirements are met, the defendant is strictly liable under CERCLA unless the defendant can prove by a preponderance of the evidence one of the three limited defenses set forth in 42 U.S.C. §9607(b), namely, that the release and the resulting damages were caused *solely* by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than an employee or agent of the defendant, or other than one whose act or omission occurred in connection with a contractual relationship. 42 U.S.C. §9607(b). *See also General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1417 (8th Cir. 1990). If Dico is found responsible for at least a portion of the response costs, it also can attempt to minimize its damages by proving by a preponderance of the evidence that the damages at issue are divisible and can be reasonably apportioned. *See Dico,* 136 F.3d at 579.

B. Whether United States Has Proven a Causal Connection

As stated by the Eighth Circuit in its order remanding

the matter to this Court for a trial on the merits, Dico does not necessarily deny its operations could have caused contamination to the *soil* on its property. *Dico,* 136 F.3d at 578. At least for purposes of the present litigation, however, Dico adamantly denies its operations and/or resulting soil contamination contributed to the *groundwater* contamination at OU-1. This Court does not agree.

1. Evidence of Releases

First, the Court finds the United States has proven by a preponderance of the evidence that Dico is responsible for releases of TCE that occurred over time on its property. Dico does not dispute that it used large quantities of TCE in its degreasing vats. Based largely on the deposition testimony of Dico's maintenance supervisor, William O'Brien, the Court finds that some quantity of TCE leaked from known cracks in the degreasing vat *through* the concrete containment pit and into the ground underneath. *See generally Findings of Fact 11-15.* Although Mr. O'Brien did not actually see a crack in the containment pit, he stated he was "amazed" that no TCE liquid and/or sludge had accumulated in the concrete pit after dripping in large quantities through *known* cracks in the degreasing vat. O *'Brien Dep., at 136:20-137:11.* The only reasonable conclusion the Court can reach from Mr. O'Brien's observation is that TCE somehow escaped from the pit itself, via cracks or otherwise. This conclusion is also consistent with the testimony of the United States' expert, hydrogeologist John Robertson, that "all of the sites that [he had] looked at that had... concrete vapor degreaser sumps... had subsurface contamination problems beneath the degreaser." *Tr. Tr. 62.*

Second, the record reflects that Dico routinely dumped and spread sludge containing TCE residue directly on its property. *See generally Findings of Fact 19-20.* Third, Arthur Hilliard, who worked in Dico's chemical supply division, testified that he witnessed at least a small quantity of TCE leak during the drum filling process. *Tr. Tr. 263.* Although he and other Dico employees attempted to clean-up the leaks as soon as possible, the Court does not find persuasive his testimony that all of the TCE evaporated into the air. Finally, Mr. Hilliard testified that he had seen drips from the railcars that delivered TCE to Dico for ultimate distribution though its chemical supply division. *Tr. Tr. 266.* Although the Court is uncertain whether Dico can be held responsible for these leaks, due to the fact Dico did not own the railcars, the testimony is relevant to the extent it helps to explain the overall pattern of contamination.

2. Evidence Showing Causal Connection between Releases and Groundwater Contamination

The Court further finds that the United States has proven by a preponderance of the evidence that a causal link exists between the above releases of TCE and the pattern of groundwater contamination identified by the EPA and Eckenfelder, Inc., who was hired by Dico to perform the investigatory and clean-up activities ordered by the EPA. At trial, Mr. Robertson testified that the highest concentrations of TCE in the groundwater were found beneath Dico's degreasing pit and other areas of high use. *Tr. Tr.* 68. *See*

also Plaintiff's Exh. 83 at 2[1] *(Final Draft Expert Report of*

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[1] Mr. Robertson provided three technical opinions regarding the Des Moines TCE Site:

> 1. Groundwater at and adjacent to the Dico, Inc. plant property in Des Moines, Iowa is contaminated with trichloroethylene (TCE) and other related volatile organic compounds (VOCs), such as dichloroethenes (DCE) and vinyl chloride. The areas of greatest groundwater contamination are at Dico's property beneath areas where Dico used, stored, transferred or otherwise handled TCE and/or TCE-laden wastes.
>
> 2. Past surface or near-surface releases of TCE and related VOCs at the Dico property have been the only significant sources of the groundwater VOC contamination at the Des Moines TCE Superfund Site. VOC releases at Dico's property are also the source of VOC-contaminated soils at the property.
>
> 3. Although there is some evidence of minor releases from sources north of the Dico property, it is not possible to determine a distinct quantitative contribution or apportionment of Dico versus non-Dico sources to a reasonable degree of scientific certainty. However, to a reasonable degree of scientific certainty, releases of TCE and related VOCs at Dico have contributed **at least** 98.7 percent of the groundwater contaminants addressed by the remedial response action for the Site.

Plaintiff's Exh. 83 at 1-2 (emphasis in original).

John B. Robertson); see also Plaintiff's Exh. 4 at L000419, L000427-29 (groundwater monitoring wells NW-7 and NW-12, which are located to the immediate west of Dico 's main production building showed presence of TCE in the thousands of parts per billion).

Furthermore, soil sampling data collected above the highest groundwater contamination zones-west of the Dico production building-also have high concentrations of TCE and other volatile organic compounds ("VOCs"). *Plaintiff's Exh. 83 at 4.* Mr. Robertson connected the groundwater and soil contamination with releases from Dico by explaining that because TCE in its liquid, or DNAPL,[2] phase, is heavier than water, *see Tr. Tr. 43,* "it tends to move straight down" into the soil....Even when it hits the water table it continues sinking because it weighs 50 percent more than water." *Id.* As the TCE migrates downward into the soil and toward the groundwater, it leaves a trail of residual DNAPL behind, which itself will migrate downward and eventually reach the groundwater. *Id. at 42.* TCE in its vapor phase is heavier than air, and so also will sink to an extent into the soil gases, but will then diffuse in all directions. *Id.* This process of diffusion explains the "bulls-eye" pattern identified in the maps, with the heaviest concentrations directly below the site of historically heavy TCE usage, with residual samplings of TCE detected in lower concentrations around the center of the bulls-eye.

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[2] NAPL is an acronym used to describe a non-dissolved, or "non-aqueous" liquid. Because TCE is thicker and heavier than water, its NAPL phase is commonly referred to as DNAPL, or dense non-aqueous phase liquid. *Tr. Tr. 40.*

In addition, Mr. Robertson stated in his report that the relative concentrations of DCE, a TCE degradation product, compared to TCE in groundwater samplings generally increases along with the distance away from the Dico source areas. *Plaintiff's Exh. 4 at L000419-20.* This fact, coupled with the fact that DCE travels as much as two to four times faster through groundwater than TCE, provides further support for his theory that the contamination originated at the Dico source areas: Slow-moving TCE is found in the groundwater closer to the source, whereas its degradation product, DCE, can migrate faster and farther from its origin. *Plaintiff's Exh. 83 at L004050.*

Last, the Court notes that the groundwater zones of high TCE concentration have changed little since first mapped in 1984, further suggesting that past deposits of VOCs into the soil are migrating over time into the groundwater directly underneath. *Plaintiff's Exh. 83* at 4-5.[3]

Dico argues that Mr. Robertson's analysis fails to consider possible alternative sources of contamination, and is therefore unreliable and inadmissible under *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579 (1993) and *Kumbo Tire*

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[3] At this juncture, the Court acknowledges that Dico questions whether TCE in its DNAPL phase was located on or near the Site. Mr. Robertson testified that TCE was found in one of three samples tested in concentration levels of about 1 percent. *Tr. Tr. 149.* He further testified that DNAPL is "hard to find," and that a dissolved concentration of a DNAPL chemical in groundwater of 1 percent or greater is, under current standards, an indication that DNAPL is in fact present. *Tr. Tr. 148-50.* Although the evidence is not entirely conclusive, the Court finds Mr. Robertson's testimony and explanation sufficient to support the United States' overall theory.

Co. v. Carmichael, 526 U.S. 137, 149, 119 S. Ct. 1167, 1175 (1999).[4] Under *Daubert, Kumbo Tire*[5] and their progeny, federal district courts are charged with screening the relevance and reliability of all expert testimony.[6] *See, e.g., Forklifts of St. Louis, Inc. v. Komatsu Forklift, USA, Inc.,* 178 F.3d 1030, 1035 (8th Cir. 1999) (citing *Kumbo Tire,* 526 U.S. at 147-52, 119 S. Ct. 1174-76). *"Daubert suggests* that a trial court, when assessing the reliability of expert testimony, consider (1) whether the concept has been tested, (2) whether the concept has been subject to peer review, (3) what the known rate of error is, and (4) whether the concept is generally accepted by the community." *Pestel v. Vermeer Mfg. Co.,* 64 F.3d 382, 384 (8th Cir. 1995) (emphasis added). In *Kumbo Tire,* however, the Supreme Court reiterated that these four factors are *not* absolute, and that a district court has substantial discretion in evaluating an expert's reliability, as well as the relevance of his or her testimony. *Kumbo Tire,* 526 U.S. at 147-52, 119 S. Ct. at 1174-76.

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[4] Dico's post-trial argument incorporates by reference arguments raised in its September 9, 1999 motion to preclude the testimony of John Robertson. For the reasons outlined in the discussion, above, Dico's motion to preclude the testimony of John Robertson is DENIED.

[5] In *Kumbo Tire,* the Supreme Court held that *Daubert* applied equally to "testimony based on 'technical' and 'other specialized' knowledge." *Kumbo Tire,* 526 U.S. at 141, 119 S. Ct. at 1171.

[6] The relevance of Mr. Robertson's testimony is not at issue in the present case.

In the present case, the Court finds Mr. Robertson's testimony is sufficiently reliable to withstand Dico's *Daubert* challenge. As evidenced by his curriculum vitae and trial testimony, Mr. Robertson has an extensive background in the investigation of groundwater contamination, and has authored or co-authored numerous articles and one textbook pertaining to the remediation of groundwater contaminants. *See Plaintiff's Exh. 83 at L0040606-69; Tr. 15-17.* Furthermore, the computer software used to form his theories, MODFLOW, is the same software used by Dico's expert, Abdul Abdul, Ph.D., suggesting a high degree of testing, reliability, and acceptance among other hydrogeologists. Dico's claim that Mr. Robertson used inappropriate and arbitrary data points to acheive his MODFLOW results goes to the weight to be given Mr. Robertson's testimony-not to the reliability of the concepts upon which he relied to reach his conclusion.

With regard to Dico's specific challenge that Mr. Robertson's computer modeling does not account for ground water flow "from the north," the Court notes that in fact the model's northern boundary extends to include several sampling points north of the Dico property. *Plaintiff's Exh. 83 at L004051-52.* Mr. Robertson accounts for the minimal flowage that would come from north of the model-through soil with relatively low permeability-by allowing it to enter the model as "recharge," or rainfall. *Tr. Tr. 125.* The fact Mr. Robertson chose not to extend the boundary along the entire length of the Ingersoll Run reflects his independent conclusion that data collected along the Ingersoll Run suggests the channel is not a conduit for contamination. *Plaintiff's Exh. 83 at L004048.*

Similarly, the Court agrees with Mr. Robertson's conclusion that if contaminants reached the Dico property via the Ingersoll Run, contamination would have been found in samplings taken along its route, as well as at its point of termination. *See Plaintiff's Exh. 83 at L004048; Tr. Tr. 74.* As explained by Mr. Robertson in his report, "[o]nly a few high VOC soil contamination zones occur near Ingersoll Run and those zones are directly associated with Dico source areas between the production building and building No. 2." *Id.* Furthermore, the highest contamination zones in the groundwater are not directly below the Ingersoll Run, but adjacent to Dico's main production building, *Id.*

Dico further challenges Mr. Robertson's theory that soil boring data collected by Dico's contractor, Eckenfelder, Inc., show a continuous line of contamination from the surface to the groundwater.[7] *Tr. Tr. 82-83; see also Plaintiff's Exh. 83 at L004046.* Specifically, as part of the Remedial Investigation Report prepared by Eckenfelder on behalf of Dico for OU-2, Eckenfelder personnel drilled 69 deep soil borings on and around the Dico property. *See Plaintiff's Exh. 32 at L006699, L006842 (map of borings).* According to the Report:

> Soil samples were collected from each boring for chemical analysis in order to characterize potential source areas and to generally characterize the [South Area Source Control]

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[7] The Court further notes that this particular issue played a significant role in the Eighth Circuit's decision reversing this Court's earlier grant of summary judgment. *See Dico,* 136 F.3d at 579 ("the methodology employed in the sampling and the testing of [the soil borings] is open to serious challenge").

project site....

In each boring, soil samples were collected continuously in two-foot intervals in accordance with ASTM D-1586 protocol. Two- or three-inch diameter, 24-inch long split-spoons were used to collect samples. The split-spoon samples were collected from the ground surface to a depth of approximately two feet below the groundwater table. Each two foot sample interval was visually examined and described in general accordance with the Burmister Soils Classification System....

Two soil samples intended for laboratory analyses were collected from each soil boring. One sample was collected from the upper 1.5 feet of the overbank deposits. A second sample was taken from the interval from which the highest head space measurement was recorded. However, in some cases, the second sample was selected from the fill if the highest head space reading was from a sample collected below the water table. Samples were not collected for analysis from below the water table because the chemical results would be affected by chlorinated VOCs in the groundwater. The samples collected from each boring were analyzed for selected HSL parameters, depending on the nature of suspected contamination in each potential source area.

Plaintiff's Exh. 32 at L006700.

During trial, and in its post-trial brief, Dico made much of the fact that only two samples per boring were sent for laboratory sampling. *See Tr. Tr. 100.* Accordingly, Dico contends the laboratory results obtained from the deep boring samples cannot alone establish a continuous line of contamination. *Id.* A review of the trial transcript, however, reveals that Mr. Robertson does not dispute this point, and in fact used the deep boring samples primarily to determine whether they were consistent with *other evidence in the record. Tr. Tr. 101.*[8] Even if the Court disregarded the deep boring samples in their entirety, however, Mr. Robertson's computer modeling, combined with his testimony regarding the general migration pattern of TCE, provides sufficient evidence of a causal link between Dico releases and the resulting groundwater contamination.

Finally, Dico contends in its post-trial brief that Mr. Robertson in effect "ignored" the discovery of contaminants in the Martin Luther King Expressway ("MLKE") area, despite the fact many of the same contaminants were found in the MLKE area as in the Dico recovery wells. *See Dico, Inc.'s Post-Trial Brief at 13.* In fact, however, Mr. Robertson stated that after being asked to reconsider his opinions based on contamination found in the MLKE area, he not only visited

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[8] To the extent Dico uses the deep boring sample results to support its *Daubert* challenge to Mr. Robertson's testimony, the Court notes the sampling was designed and implemented by Dico's contractor, Eckenfelder, Inc.-not by Mr. Robertson. Furthermore, if the method used is in fact unreliable, Dico has failed to offer any evidence of what generally accepted scientific method *should have been* applied.

the area, but also "examined the data presented in the reports and the way it's mapped on [the City of Des Moines' contractor's] charges and the reports, their maps, and the relationship to the wells and borings that they put in and its relationship to the down-gradient zones all the way down to Dico." *Tr. Tr. 128. See also Plaintiff's Exh. 84 (Mr. Robertson's Supplemental Expert Submission regarding MLKE data).* It was Mr. Robertson's conclusion, which this Court finds both reasonable and persuasive, that because the MLKE site is isolated from the Dico site, lies in soil with relatively low permeability, and has a somewhat different chemical "fingerprint," it has not contributed to the contamination pulled from the wells on and in the immediate vicinity of the Dico property.[9] *Tr. Tr. 139.*

For the reasons outlined above, the Court rejects Dico's *Daubert* challenge to Mr. Robertson's testimony, and finds his testimony to be both accurate and persuasive.[10]

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[9] Dr. Abdul's opinion to the contrary is discussed with regard to Dico's affirmative defenses, below.

[10] In the event the Court denied its *Daubert* challenge, Dico also moved in limine to limit Mr. Robertson's trial testimony to "matters disclosed in his report, supplemental report, and depositions." Dico's September 15, 1999 Motion in Limine to Limit Testimony of John Robertson, at 5. In order entered October 7, 1999, this Court deferred ruling on the motion pending trial on liability.

As stated in its September 15, 1999 motion, Dico's major concern appeared to be that Mr. Robertson would attempt during trial to supplement his opinion regarding the MLKE data with computer modeling or calculations he had not disclosed pre-trial. Dico's concerns did not materialize, however. Mr. Robertson limited his trial testimony of the MLKE contamination to that previously disclosed to Dico. *See* Tr. Tr. 128-29. Accordingly, Dico's September 15, 1999 motion to limit Mr. Robertson's testimony is DENIED as MOOT.

Although Mr. Robertson himself did not generate the data used in his calculations, this fact alone is insufficient to detract from his opinions. The Court further finds the United States has established by a preponderance of the evidence that the data samplings collected in large part by Dico's contractor and upon which Mr. Robertson relied are sufficient to support his conclusions.

3. Dico's Theory to the Contrary

Prior to reaching its formal conclusion regarding the United States' case-in-chief, the Court deems it appropriate to address briefly the primary admissible opinion of Dico and its expert, Dr. Abdul, that 100 percent of the chemicals of concern ("COCs") detected and recovered in OU-1 came from sources north of Dico's property,[11] *Tr. Tr. 324.* The Court

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[11] As argued in the United States' post-trial brief, Dr. Abdul testified at trial regarding a number of opinions that were not contained in his expert report, or otherwise disclosed to the United States prior to trial. The Court finds several opinions are *excluded* pursuant to Federal Rule of Civil Procedure 37 for failure to timely disclose the opinions without substantial justification. *See Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998) ("untimely expert disclosure was neither substantially justified nor harmless").

For example, during trial Dr. Abdul challenged Mr. Robertson's methodology for analyzing on-site sources of contamination other than sludge spreading. *Tr. Tr. 363.* Although a party may rebut another party's expert report pursuant to Federal Rule of Civil Procedure 26(a)(2)(C), Dico failed to meet the thirty day deadline allowed under the Rule. Accordingly, this new opinion is excluded from the record.

In addition, Dr. Abdul stated for the first time during trial an opinion regarding the chemical "fingerprint" at the MLKE project site in comparison to the chemical makeup of contaminants identified below the Dico facility. Mr. Robertson's supplemental report, which purportedly contains the opinion rebutted during trial by Dr. Abdul, was disclosed to Dico four months prior to trial, *see*

formally rejects this theory for several reasons. First, although COCs were in fact discovered in the soil and grrmndwater around the MLKE area, concentrations of the contaminants diminish markedly within two blocks of the area. *See Defendant's Exh. 156-C.* The record is devoid of evidence of significant concentrations of COCs in soil samples taken between the MLKE project area and the Dico property. Specifically, the soil gas measurements and borings taken during OU-3 at the former Solar Aircraft facility and the Meredith Publishing Company did not show significant TCE or COC concentrations. *Tr. Tr. 217-19; Plaintiff's Exh. 53 at DB013875-77, DB013925-26.* The same is true of samples taken at the MTA facility and the Wallace Homestead Properties. *Plaintiff's Exh. 53 at DB013926.*

Plaintiff's Exh. 84. Dr. Abdul's new opinion regarding the chemical makeup of the MLKE area contaminants is therefore, excluded.

The Court also excludes for similar reasons Dr. Abdul's opinion regarding biodegradation either at the Des Moines TCE Site, or the MLKE project area. *See Tr. Tr. 531 (conceding opinion was not contained in report).* The Court also will-not consider Dr. Abdul's opinion that contaminants migrated in vapor-phase *from the groundwater under the Dico property into the soil. Tr. Tr. 512 (admitting opinion was not discussed in expert report).* Finally, the Court excludes from the record Dr. Abdul's opinion that sewer path lines would form preferential pathways for the contaminants to travel from the north onto Dico property. *Tr. Tr. 430 (acknowledging opinion not contained in report).*

The Court notes, however, that the outcome of the litigation would not change even if the above opinions were admitted due to the fact Dr. Abdul and Dico has failed to establish a clear connection between the contamination found in the MLKE project area and that pulled from the groundwater beneath the Dico property.

Second, Dr. Abdul failed to convince the Court that the Dico property is hydraulically connected to the MLKE project area. No TCE, DCE or vinyl chloride was found in soil borings taken to determine whether contamination had migrated to the Dico property via the Ingersoll Run storm sewer system. *Plaintiff's Exh. 53 at DB13926.* And although small levels of contamination were identified in seven of thirteen wells monitored along the sanitary sewers and the Ingersoll Run north of the Dico property, *see Plaintiff's Exh. 53 at DB13959-60,* the well exhibiting the highest concentration of COCs was adjacent to a *sanitary sewer*-not the Ingersoll Run. *Plaintiff's Exh. 53 at DB13959.* Significantly, samplings taken from an adjacent well indicate the contaminants "do *not* move along the Ingersoll Run sewer with any appreciable volume or concentration." *Id. (emphasis added).* The Court further notes the Ingersoll Run was blocked and diverted north of the Dico property around 1969, and Dr. Abdul was unable to identify an alternative conduit that could carry contaminants from the north onto Dico's property. *Tr. Tr. 436.*

Finally, the Court finds unreliable Dr. Abdul's attempt to measure hydraulic conductivity in the areas north of Dico and therefore prove that groundwater traveled from these areas onto the Dico property. Dr. Abdul did not independently verify the accuracy of his computer-generated contour lines, and as a result, many of the measurements are clearly off by several feet. For example, the computer measurement for well MW-3 is between 900 and 910 feet, whereas the measured water level in that well is 948.16 feet. *Tr. Tr. 486-88.* Similarly, the computer-generated water level for well MW-4 is between 890 and 900 feet, whereas the actual measured level is 940 feet. At least three other

calculations are similarly inaccurate, with at least one of Dr. Abdul's computer-generated calculations pinpointing the water table at that location *above the ground surface. Tr. Tr. 491-92.* The Court therefore assigns little weight to Dr. Abdul's hydraulic conductivity model.

In short, Dico and its expert, Dr. Abdul, have failed to establish that 100 percent of the contamination identified in the groundwater at OU-1 originated north of the Dico property.

4. Conclusion Regarding United States' Case-In-Chief

Based on evidence of releases of TCE occurring on the Dico property, combined with Mr. Robertson's trial testimony and expert report, the Court finds the United States has proven by a preponderance of the evidence that Dico is in fact responsible for releases of TCE that led to groundwater contamination at OU-1. Dico has previously admitted that the EPA paid all response costs for work related to OU-1, OU-2 and OU-3 out of the Hazardous Substances Superfund ("the Superfund"). *See Defendant Dico. Inc.'s Response to the Plaintiff's Statement of Alleged Undisputed Facts and Additional Statements of Material Facts (Aug. 9, 1999) at ¶ 13.* Accordingly, the Court concludes that the United States has established "a causal nexus between [Dico's releases] and the incurrence of response costs." *Dico,* 136 F.3d at 578 (citing *Control Data Corp.,* 53 F.3d at 934). Whether the costs incurred by the EPA with regard to OU-1 were necessary and consistent with the national contingency plan will be addressed in conjunction with the United States' pending motion for summary judgment on response costs.

In reaching its conclusion, the Court acknowledges the United States has not proven Dico is responsible for a certain *quantity* of contamination. Several circuits, however, including the Eighth Circuit, have held that CERCLA does not require a minimum threshold of contamination before liability is imposed. *Acushnet Co v. Mohasco Corp.*, 191 F.3d 69, 76 (1st Cir. 1999) ("CERCLA itself does not expressly distinguish between releases (or threats of releases) by the quantity of hazardous waste attributable to a particular party."). *Stewman v. Mid-South Wood Products of Mena, Inc.*, 993 F.2d 646, 649 (8th Cir. 1993) ("[T]here is no minimum quantitative requirement to establish a release or threat of a release of a hazardous substance under CERCLA.") (citations omitted). *See also A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998) (same); *Amoco Oil Corp. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) (same). As stated in its April 1997 order granting the United States' first motion for summary judgment, if Dico continues to believe it can prove other sources of contamination, it may file an action for contribution pursuant to 42 U.S.C. §9613(f). This section provides in relevant part that: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title." 42 U.S.C. §9613(f).

III. Whether Dico Proved its Third Party Defense

As set forth above, 42 U.S.C. §9607(b)(3) provides a complete defense to CERCLA liability if Dico can prove by a preponderance of the evidence: (1) that the contamination was caused solely by an act or omission of a third party; (2)

that Dico "exercised due care with respect to the hazardous substance concerned"; and (3) that it "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. §9607(b)(3). Because the Court finds that Dico cannot establish the contamination was caused solely by a third party, it need not address the remaining elements.

IV. Whether Dico Proved Harm is Divisible

Liability under section 9607 is joint and several unless the defendant can establish by a preponderance of the evidence a "reasonable basis" by which to apportion liability, or to establish that distinct harms exist. *See, e.g., In Re Bell Petroleum Services, Inc.*, 3 F.3d 889, 902-03 (5th Cir. 1993).[12] For example, a defendant can produce evidence showing "relative toxicity, migratory potential, degree of migration or 'synergistic capacities' of the hazardous substances at issue." *Memphis Zane May Assoc. v. IBC Manufacturing Co.*, No. 94-2132-D, 1996 WL 785085, at *6 (W.D. Tenn. Sept. 30, 1996) (quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711,722 (2d Cir. 1993)).

In its post-trial brief, Dico contends that if the Court finds the United States has proven that Dico contributed to the

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[12] Although the statute itself does not provide for apportionment of liability, courts have formed this partial defense based on section 433A of the *Restatement (Second) of Torts* (1977). *See e.g. United States v. Alcan Aluminum Corp.*, 990 F.2d 711,722 (2d Cir. 1993); *United States v. R. W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988).

contamination at OU-1, Dico should only be held responsible for the quantity of TCE recovered in the initial stage of remediation, or 5 percent of the total recovered TCE. This argument is based on Dr. Abdul's opinion that "at least 95 percent of the chemicals of concern that were recovered by the Dico recovery wells flowed onto the Dico property since the remedial wells were turned on." *Tr. Tr. 338.* Initially, the Court notes this opinion mirrors opinion number 2 of Dr. Abdul's Expert Report, which Dico *withdrew* during its opposition to the United States' second Motion for Summary Judgment on Liability. *See Tr. Tr. 338-39; Defendant's Exh. 156 at 07892.*[13] During Dr. Abdul's direct examination, however, Dr. Abdul and counsel for Dico claimed Dico was nevertheless entitled to rely on the withdrawn opinion because it served as one of the bases for Dr. Abdul's opinion number 4.[14] *Tr. Tr. 338-39.* This Court does not agree, and rejects

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[13] The full opinion in Dr. Abdul's Expert Report provides:

> The VOCs originally contained in the soil and groundwater beneath the Dico property prior to remediation is less than 5% of the volume of VOCs that has been recovered by the Dico recovery wells. Thus, more than 95% of the recovered VOCs flowed onto the Dico property since remediation began.

Defendant's Exh. 156 at 07892.

[14] Opinion number 4 provides:

> The groundwater flow from the north and storm/sewer discharge from the north upland area through the Ingersoll Run are responsible for the delivery of VOCs into the soil and groundwater located beneath the Dico property.

Dico's attempt to rely on an opinion it formally withdrew only months before trial.

Even assuming the opinion is admissible, however, Dico has failed to prove its accuracy by a preponderance of the evidence. As discussed in part I(B)(3) above, Dico has failed to prove the Ingersoll Run, or any other pathway, in fact transported VOCs from the north into the groundwater pumped from beneath Dico soil. The trail of contaminants found near the MKLE project stops long before it reaches the Dico property, and neither Dr. Abdul, nor the OU-3 data, points to any other significant source of contamination as a potential point of origination.

As outlined in its April 1, 1997 order granting the United States' first motion for summary judgment, the Court does not question that some percentage of contamination-albeit far less than the 95 percent figure urged by Dico-originated *somewhere* north of the Dico property, and that a "north plume" of contamination at one point existed. *United States v. Dico, Inc.*, 979 F. Supp. 1255, 1261 (S.D. Iowa 1997), *rev'd United States v. Dico, Inc.*, 136 F.3d 572 (8th Cir. 1998). In order to succeed under its divisibility defense, however, Dico must establish a "reasonable basis" for apportionment of liability. *In Re Bell Petroleum Services, Inc.*, 3 F.3d at 902-03. This Dico has failed to do.[15]

Defendant's Exh. 156 at 07895.

[15] Although Dico presented evidence that many area businesses purchased TCE from Dico, it failed to prove by a preponderance of the evidences that any of these businesses released TCE into the groundwater that ultimately was pumped from the Des Moines TCE Site.

Accordingly, the Court finds Dico has not established the damages are divisible by a preponderance of the evidence.

CONCLUSION

For the reasons outlined above, the Court finds the United States has proven by a preponderance of the evidence that Dico is liable for response costs it incurred in connection with OU-1 at the the Des Moines, Iowa TCE Site. Judgment is DEFERRED, however, pending this Court's resolution of the United States' pending motion for summary judgment on response costs, and, if necessary, a second trial on the issue of response costs.

IT IS ORDERED that **the United States' pending motion for summary judgment on response costs shall come on for telephonic hearing before the undersigned at 9:30 a.m. on February 24, 2000. Counsel who wish to participate in this hearing should contact the Court prior to this date.**

Dico's September 9, 1999 motion to exclude the testimony of John Robertson and September 15, 1999 motion to limit the testimony of John Robertson are DENIED. Dico's two motions for judgment at the close of evidence, submitted October 13, 1999 and October 19, 1999 are DENIED.

IT IS SO ORDERED.

Dated this 14th day of February, 2000.

/s/_____

RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT

(2)

No. 01-1223

APR 20

In the Supreme Court of the United States

DICO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that persons responsible for hazardous substance contamination are liable for "all costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a). The questions presented are:

1. Whether the court of appeals correctly concluded that the district court did not abuse its discretion in denying petitioner's motion to exclude the testimony of an expert witness under Federal Rule of Evidence 702.

2. Whether the court of appeals correctly ruled that the United States was entitled to recover: (a) the costs it incurred in overseeing remedial activities conducted by private parties; (b) its indirect costs of the remedial action; and (c) litigation expenses associated with the remedial action.

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In the Supreme Court of the United States

No. 01-1223

DICO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-29a) is reported at 266 F.3d 864. The district court's order on liability (Pet. App. 45a-79a) and its order on response costs (Pet. App. 32a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2001. A petition for rehearing was denied on November 27, 2001 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action against petitioner Dico, Inc., under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the government's costs in responding to petitioner's release of hazardous substances that caused groundwater contamination and threatened the public water supply of Des Moines, Iowa. The United States District Court for the Southern District of Iowa ruled that petitioner was liable for the government's response costs and entered judgment in the amount of $4,129,426.67. See Pet. App. 43a. The court of appeals affirmed. *Id.* at 3a.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That statute, which Congress revised and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). CERCLA "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see *Bestfoods*, 524 U.S. at 55-56 & n.1.

CERCLA provides the President (acting primarily through the Environmental Protection Agency (EPA), see Exec. Order No. 12,580, 3 C.F.R. 193 (1987)) with several alternatives for cleaning up hazardous substance sites. Under Section 104, EPA can itself undertake response actions, using the Hazardous Substances

Superfund. See 42 U.S.C. 9604; see also 26 U.S.C. 9507; *Bestfoods*, 524 U.S. at 55. In such cases, EPA can recover its response costs from responsible parties under Section 107(a) through a cost recovery action. 42 U.S.C. 9607(a). Alternatively, under Section 106(a), EPA can seek, through an administrative order or a request for judicial relief, to compel the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a).

Section 107 of CERCLA, 42 U.S.C. 9607, "sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert." *Key Tronic*, 511 U.S. at 814. Under Section 107(a)(4)(A), responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A). The national contingency plan (NCP), which EPA promulgated as a regulation pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, prescribes methods for investigating the nature and extent of releases or threatened releases, and for planning and selecting response actions. See 40 C.F.R. Pt. 300.

Section 101(23) of CERCLA defines the terms "remove" and "removal" to include, among other things:

> the cleanup or removal of released hazardous substances from the environment, * * * such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, * * * or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. 9601(23). Section 101(24) defines the terms "remedy" and "remedial action" to include, among other things:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment * * *. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, * * * cleanup of released hazardous substances * * *, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

42 U.S.C. 9601(24). The terms "remove," "removal," "remedy," and "remedial action" describe "response" actions, and all such terms "include enforcement activities related thereto." CERCLA § 101(25), 42 U.S.C. 9601(25).

In establishing that a responsible party is liable for response costs, the United States need not prove that the party is the only source of the contamination or that the releases occurred in any particular amount. See, *e.g.*, *Stewman* v. *Mid-South Wood Prods. of Mena, Inc.*, 993 F.2d 646, 649 (8th Cir. 1993). The responsible party's liability to the government is joint and several, except to the extent that a defendant can establish, by a preponderance of the evidence, that there is a "reasonable basis" on which to apportion liability or to establish distinct harms. See, e.g., *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 902-903 (5th Cir. 1993); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Northeastern Pharm. & Chem. Co. (NEPACCO)*, 810

F.2d 726, 732 n.3 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

2. The United States brought this action against petitioner to recover the government's response costs associated with the remediation of groundwater contaminated by trichloroethylene (TCE) that was released from petitioner's manufacturing facility. Pet. App. 3a. The government specifically sought recovery of costs associated with "Operable Unit 1" (OU-1) of the Des Moines TCE Site. *Id.* at 3a, 51a-53a. Following a bench trial, the district court entered findings of fact and conclusions of law holding petitioner liable for the government's response costs. *Id.* at 45a- 75a. The court thereafter concluded that the government was entitled to the full amount of costs that it had requested. *Id.* at 32a-44a.

The district court based its liability ruling on extensive scientific evidence submitted at trial respecting the migration of TCE from petitioner's facility into the groundwater supply. That ruling sets out findings of facts describing petitioner's use and release of TCE, Pet. App. 46a-51a, EPA's discovery and investigation of the contamination, *id.* at 51a-53a, and the scientific evidence linking petitioner's activities with the groundwater contamination, *id.* at 54a-58a. Based on those findings, the district court concluded that petitioner's spillage and disposal of TCE caused the groundwater contamination that led to the government's incurrence of response costs. *Id.* at 58a-75a. The district court specifically rejected petitioner's contention that scientific testimony from the government's expert witness, John Robertson, should have been excluded as insufficiently reliable under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See Pet. App. 64a-70a. To the contrary, the court "f[ound] his testimony

to be both accurate and persuasive." *Id.* at 70a. See also *id.* at 58a (finding that the government's expert witness "presented logical, well-supported theories of liability" while petitioner's expert witness was "far less credible").

The district court ruled that the government was entitled to $4,129,426.67 in response costs based on the government's submission of affidavits and other documents setting out its expenditures for the response activities associated with the OU-1 portion of the Des Moines TCE Site. See Pet. App. 33a-38a. Relying on a prior ruling that constituted law of the case, the district court rejected petitioner's contention that oversight costs, indirect costs, and costs of attorneys' time are not recoverable under Section 107 of CERCLA as a matter of law. *Id.* at 39a. The district court further concluded that petitioner had failed to produce admissible evidence to counter the government's cost submissions or otherwise show that they were inaccurate. *Id.* at 39a-43a.

3. The court of appeals affirmed the district court's rulings on liability and response costs in their entirety. Pet. App. 2a-29a. The unanimous court rejected all of petitioner's numerous challenges to the district court's decisions. *Ibid.* Only two of the court of appeals' rulings are relevant to the petition for writ of certiorari.

First, the court of appeals held that the district court had properly denied petitioner's motion, under *Daubert*, to exclude the testimony of the United States' expert witness. Pet. App. 6a-12a. The court of appeals found that petitioner "has not pointed to any deficiency in the reliability of Robertson's testimony that would lead us to conclude the District Court abused its discretion." *Id.* at 12a. Rather, petitioner's objections merely "amount to an argument that the District Court should

have given more weight to [its] expert's interpretation of the data at issue." *Id.* at 11a-12a.

Second, the court of appeals rejected petitioner's contentions that Section 107(a) of CERCLA does not authorize the government to recover certain categories of response costs that were included within the district court's award. The court specifically concluded that Section 107(a) entitled the government to recovery of: (a) $730,060.74 in government oversight costs for remedial actions conducted by responsible persons at the government's direction; (b) $508,284.76 in indirect costs, such as overhead expenses of the Superfund program, attributable to the remedial actions at the site; and (c) $370,453.57 in costs of attorneys' time and other litigation expenses associated with recovering response costs at the site. Pet. App. 20a-27a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenges to the district court's exercise of discretion in admitting expert testimony and to its determination of recoverable categories of CERCLA response costs. The challenged rulings are consistent with established law, do not conflict with any decision of this Court or another court of appeals, and do not present issues otherwise warranting this Court's review.

1. Petitioner claims (Pet. 12-21) that the court of appeals erred in finding that the district court acted within its discretion in admitting the testimony of the United States' expert witness. Petitioner does not contend that the court of appeals' decision conflicts with any decision of this Court of any other court of appeals. Instead, petitioner seeks review based on a fact-specific challenge to the district court's exercise of discretion in this particular case. That challenge plainly does not

present an issue of general importance warranting review by this Court. In any event, the court of appeals properly affirmed the district court's decision.

In determining the admissibility of expert witness testimony under Fed. R. Evid. 702, the district court must ensure that scientific or other technical testimony is relevant and reliable. *Daubert*, 509 U.S. at 589. The district court must specifically determine whether the expert "is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-593. The district court has "considerable leeway" in deciding how to determine the reliability of expert testimony, and its ruling on whether to permit expert testimony is reviewed for an abuse of discretion. See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999).

In this case, the district court correctly concluded that the expert testimony clearly exceeded the *Daubert* threshold. See Pet. App. 66a. The government's expert applied established and accepted scientific concepts and methodologies to the issues in dispute. *Ibid.* Petitioner challenges the reliability of the government expert's conclusions, but the district court expressly found the government's expert "presented logical, well-supported theories of liability," while petitioner's expert was "far less credible." *Id.* at 58a. Indeed, the arguments that petitioner sets out in its request for review demonstrate that petitioner's supposed *Daubert* challenge simply "amount[s] to an argument that the District Court should have given more weight to

[petitioner's] expert's interpretation of the data at issue." *Id.* at 11a-12a.

a. Petitioner contends that Robertson programmed his computer model to exclude the possibility of contamination from properties north of petitioner's manufacturing facility and that the court of appeals improperly failed to address that error by wrongly concluding that Robertson's computer model did not form the basis for his conclusion that TCE contamination originated from petitioner's property. Pet. 13-14. Petitioner is mistaken. As the district court correctly found, Robertson properly accounted for flowage from the north by programming it into the model as recharge or rainfall. Pet. App. 66a. Furthermore, the court of appeals correctly recognized that Robertson did not use that model to support his opinion that petitioner caused at least some of the contamination. *Id.* at 8a. Rather, he used that model to support his opinion on the percentage of contamination for which petitioner was liable, in order to determine whether liability could be apportioned between petitioner and other parties. *Id.* at 62a n.1. Petitioner did not appeal the district court's ruling that liability was not divisible, and the court of appeals correctly concluded that Robertson's use of the computer model was immaterial to petitioner's appeal. Indeed, the court of appeals properly rejected in its entirety petitioner's claim that Robertson had failed to consider whether the contamination came wholly from north of petitioner's property, finding that Robertson's testimony "shows that he considered each piece of data that [petitioner] alleges he ignored." *Id.* at 8a.

b. Petitioner wrongly contends that Robertson's opinion—that "dense non-aqueous phase liquid" (DNAPL) beneath petitioner's property provided the source of continuing high concentrations of TCE—was

not credible. Pet. 15-16; see Pet. App. 54a, 63a (describing the significance of DNAPL). The district court correctly found that, in one test sample, DNAPL was found in concentration levels of about one percent which, under then-current professional standards, indicated that DNAPL was present. *Id.* at 64a. The court of appeals properly refused to disturb the district court's determination, additionally noting that Robertson's conclusions regarding the presence of DNAPL in the soil were supported by tests run by petitioner's own consultant and were consistent with that consultant's conclusion that DNAPL was probably present. *Id.* at 10a-11a.

c. Petitioner also asserts that data from deep-soil boring samples were insufficient to support Robertson's conclusion that there was continuous contamination from the soil surface to the groundwater. Pet. 18-19. That assertion, even if true, does not support petitioner's claim that Robertson's testimony should have been excluded. Both the district court and the court of appeals found that Robertson did not rely on those borings to support his opinion that releases from petitioner's operations contributed to the groundwater contamination. Pet. App. 10a, 69a. The district court concluded that the government established causation even in the absence of the testimony on the deep soil borings. *Id.* at 69a. Furthermore, the court of appeals correctly held that petitioner's challenges to Robertson's conclusions went to credibility and not to admissibility and therefore were matters for the trier of fact to decide. *Id.* at 10a. See, *e.g.*, *Hose* v. *Chicago N.W. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); *United States* v. *L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993); *Jones* v. *Otis Elevator Co.*, 861 F.2d 655, 663

(11th Cir. 1988); *Breidor* v. *Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-1139 (3d Cir. 1983).

d. Petitioner improperly seeks to challenge the admissibility of Robertson's expert opinion regarding the penetration of TCE from sludge spread on the ground. Pet. 16-18. Petitioner argues that Robertson's opinion was contradicted by petitioner's expert and that Robertson offered no data for his conclusion that TCE penetrated the degreasing vat and concrete containment pit to contaminate the soil below. See *ibid.* Petitioner did not raise those issues in its *Daubert* challenge in the court of appeals. Instead, petitioner simply contended that the United States failed to meet its burden of proving that TCE from petitioner's operations contaminated the soil, a question it does not ask this Court to consider. See Pet. App. 15a-18a. In any event, the court of appeals correctly concluded that record evidence contradicted the testimony of petitioner's expert regarding the penetration of TCE into the soil and that petitioner did not demonstrate that the district court clearly erred in crediting Robertson's testimony over the conflicting testimony of petitioner's expert. *Id.* at 17a-19a.

2. Petitioner contends (Pet. 22-29) that the court of appeals' "imposition of indirect and oversight costs" in this case conflicts with the Third Circuit's decision in *United States* v. *Rohm & Haas Co.*, 2 F.3d 1265 (1993). Petitioner is mistaken. The court of appeals disagreed with the Third Circuit's analytical approach to oversight costs, but it determined that this case presented a distinguishable issue and that the same result would obtain in this case, in any event, under the Third Circuit's analysis. Pet. App. 21a-24a. The court of appeals also correctly rejected petitioner's arguments respecting recovery of indirect costs and litigation expenses,

id. at 24a-26a, and those rulings do not present any basis for alleging a conflict among the courts of appeals.

a. CERCLA entitles the government to collect "*all costs* of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." CERCLA § 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A) (emphasis added). The Third Circuit nevertheless ruled in *Rohm & Haas* that CERCLA's definition of a "removal" action, see CERCLA § 101(23), 42 U.S.C. 9601(23) (set out at p. 3, *supra*), does not include government oversight of a private party's removal activities. That court concluded that the courts should interpret the term "removal" in light of the so-called "clear statement" doctrine arising from *National Cable Television Association* v. *United States*, 415 U.S. 336 (1974). The Third Circuit held, based on its reading of *National Cable*, that Congress was required to clearly state that oversight costs are recoverable, and that "any ambiguity must be resolved in favor of the defendants." 2 F.3d at 1275. Applying that standard, *Rohm & Haas* held that CERCLA's definition of "removal" does not include EPA oversight of a private party's removal actions. *Id.* at 1278.[1]

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[1] The Third Circuit's decision reflects an expansive view of *National Cable* that this Court has not embraced. In *National Cable*, this Court addressed the Independent Offices Appropriation Act, 1952, ch. 376, Tit. 5, 65 Stat. 290, which authorized the heads of federal agencies to prescribe fees for "any work, service . . . benefit, . . . license, . . . or similar thing of value"; and provided that the fee was "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." 415 U.S. at 337 (quoting statute). The Court held that, "to avoid constitutional problems" of improper delegation of taxing

The court of appeals in this case "disagree[d] with the Third Circuit's analysis." Pet. App. 23a. It noted that the *National Cable* case involved the FCC's attempt, without specific congressional authorization, to impose user fees on parties regulated by the agency that were in the nature of tax assessments. See *ibid.* The court correctly recognized that the principle articulated in *National Cable* does not apply to a liability statute, such as CERCLA, that is expressly "designed to make parties responsible for introducing hazardous waste into the environment pay for cleaning up the messes they have created." *Ibid.* The court of appeals noted

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authority, it was necessary to construe the Act narrowly, to permit fees based solely on "value to the recipient." *Id.* at 342-344. Since then, this Court has limited the application of *National Cable* to the specific context of potentially unconstitutional grants of revenue generating authority. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (*National Cable* "stand[s] only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties."); *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989) (citing *National Cable* in stating that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.10 (1976) (*National Cable* does not limit the Secretary's authority to impose fees as one method of "adjust[ing]" imports, because the import statute did not pose any conceivable threat to the non-delegation principle.); see also *Weiss* v. *United States*, 510 U.S. 163, 189 n.5 (1994) (Souter, J., concurring) (citing *National Cable* in stating that the Court has read certain statutes "narrowly to avoid annulling them as excessive abdications of constitutional responsibility").

that other courts had declined to follow the Third Circuit's *Rohm & Haas* analysis in analogous cases. *Id.* at 23a-24a (citing *United States* v. *Lowe*, 118 F.3d 399, 401-403 (5th Cir. 1997), and *Atlantic Richfield Co.* v. *American Airlines, Inc.*, 98 F.3d 564, 568 (10th Cir. 1996)).

Nevertheless, the court of appeals correctly discerned that, whatever the merits of the Third Circuit's analysis, this case is clearly distinguishable from *Rohm & Haas* because it involves "remedial" actions, rather than "removal" actions. Pet. App. 24a. Echoing the view of the Tenth Circuit in *Atlantic Richfield Co.* v. *American Airlines, Inc.*, 98 F.3d 564, 568 (1996), the court explained:

> [T]he Third Circuit only addressed CERCLA's language defining *removal* actions under [Section 101(23), 42 U.S.C. 9601(23)]. CERCLA defines *remedial* actions more broadly to include "any *monitoring* reasonably required to assure that such actions protect the public health and welfare and the environment." [Section 101(24), 42 U.S.C. 9601(24) (emphasis added by the court)]. This language provides the specific congressional delegation of authority to the EPA that the clear statement doctrine of *National Cable*, as interpreted in *Rohm & Haas*, seems to require. Thus, even under the more restrictive approach advocated by [petitioner], we would conclude that oversight and indirect costs are recoverable in remedial actions under CERCLA.

Pet. App. 24a. Thus, the court of appeals reconciled its decision with that of the Third Circuit, and there is no conflict on the issue presented here. The court of appeals' mere criticism of the *Rohm & Haas* decision does not give rise to a conflict. See, *e.g.*, *Black* v. *Cutter*

Labs., 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions."). And to the extent that the Third Circuit's *Rohm & Haas* decision might give rise to a conflict with *other* cases not before the Court, that conflict is not ripe for this Court's review. The Third Circuit should be allowed an opportunity to reconsider its decision in light of the criticism it has generated.[2]

b. Petitioner contends (Pet. 22) that the court of appeals' decision affirming an award of indirect costs is "in conflict" with *Rohm & Haas*, but that contention is baseless. The Third Circuit expressly stated in *Rohm & Haas* that "this case does not involve the issue of whether indirect, overhead costs associated with

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[2] The Tenth Circuit, like the court of appeals in this case, addressed *Rohm & Haas* in an action involving only "remedial" costs and similarly held that it need not reach the *National Cable* issue because oversight falls within that term under any standard. *Atlantic Richfield*, 98 F.3d at 568. That court nevertheless noted that *Rohm & Haas*'s application of *National Cable* "is questionable." *Ibid.* The Fifth Circuit has rejected *Rohm & Haas* in an action involving both removal and remedial costs. See *Lowe*, 118 F.3d at 401 (1997) ("[w]e agree with the government and find the interjection of the *National Cable* doctrine inappropriate to our consideration of this issue of reimbursement of oversight costs"). See also *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042-1043 (2d Cir. 1985) (stating, in a decision prior to *Rohm & Haas*, and without discussion of *National Cable*, that the State of New York's monitoring costs "in assessing the conditions of the site and supervising the removal of the drums of hazardous waste squarely fall within CERCLA's definition of response costs, even though the State is not undertaking to do the removal"); cf. *United States* v. *Hyundai Merchant Marine*, 172 F.3d 1187, 1190-1191 (9th Cir.), cert. denied, 528 U.S. 963 (1999) (holding, under a provision of the Oil Pollution Act that allows the Coast Guard to recover its costs of monitoring an oil spill cleanup conducted by responsible parties, that *National Cable* "do[es] not apply here").

government removal or remedial activity at a particular facility are recoverable under § 107(a)." 2 F.3d at 1273 and n.10. While *Rohm & Haas* notes that a number of courts have held that indirect costs *are* recoverable, it did not reach the issue, and there accordingly is no conflict among the court of appeals. To the contrary, the courts of appeals that have addressed the issue have uniformly held that indirect costs are recoverable. See *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-1503 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Chromalloy Am. Corp.*, 158 F.3d 345, 352 (5th Cir. 1998); *United States* v. *Ottati & Goss*, 900 F.2d 429, 445 (1st Cir. 1990); *B.F. Goodrich* v. *Betkoski*, 99 F.3d 505, 528 (2d Cir. 1996), cert. denied, 524 U.S. 926 (1998); see also *United States* v. *Hardage*, 750 F. Supp. 1460, 1502 (W.D. Okla. 1990), aff'd in part and rev'd in part on other grounds, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 510 U.S. 913 (1993).

As the Sixth Circuit explained in *R.W. Meyer*, "the challenged indirect costs *are* attributable to its cleanup site in that they represent the portion of EPA's overhead expenses that supported the government's response action on Meyer's property." 889 F.2d at 1503. That court added that "the statute contemplates that those responsible for hazardous waste at each site must bear the *full* cost of cleanup actions and that those costs necessarily include both direct costs and a proportionate share of indirect costs attributable to each site." *Id.* at 1504. The court of appeals' affirmance of the district court's award of indirect costs in this case is consistent with the uniform case law, is correct, and provides no issue warranting further review.

c. Petitioner relegates to a footnote (Pet. 24 n.7) its argument that the United States should not be allowed to recover attorney expenses associated with collecting

its response costs. Petitioner merely asserts that *Rohm & Haas* should apply with "equal force" to that question. The courts of appeals, however, have uniformly held that the United States may recover costs of attorneys' time and other litigation expenses. Pet. App. 24a-25a; *United States* v. *Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998); *B.F. Goodrich* v. *Betkoski*, 99 F.3d at 528.[3]

The court of appeals' decision is correct. As the Ninth Circuit stated in *Chapman*, Section 107(a)(4)(A) of CERCLA "evinces an intent to provide for attorney fees because it allows the government to recover 'all costs of removal or remedial action' including 'enforcement activities' [under Section 101(25)]." 146 F.3d at 1175; see *B.F. Goodrich*, 99 F.3d at 528 (under Section 101(25), "the government's recoverable response costs properly include not only the obvious costs of remediation, but also include, *inter alia*, attorneys' fees"). The

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[3] This Court ruled in *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994), that *private parties* may not recover litigation-related fees under CERCLA Section 107(a)(4)(B), which allows those parties to recover only "necessary costs of response" (42 U.S.C. 9607(a)(4)(B)). See 511 U.S. at 819. The Court left open, however, the question whether the United States may recover such fees pursuant to Section 107(a)(4)(A), which entitles the government to "all costs of removal or remedial action" (42 U.S.C. 9607(a)(4)(A)). The Court reasoned that "it would stretch the plain terms of the phrase 'enforcement activities' too far to construe it as encompassing the kind of private cost recovery action at issue in this case," but the Court withheld comment "on the extent to which that phrase forms the basis for the Government's recovery of attorney's fees through § 107." *Key Tronic*, 511 U.S. at 819. Cf. *id.* at 824 (Scalia, J., dissenting) ("I would read 'enforcement activities' in [Section 101(25)] to cover the attorney's fees incurred by both the government and private plaintiffs successfully seeking cost recovery under [Section 107] of CERCLA.").

court of appeals' decision does not conflict with any decision of this Court or another court of appeals and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. _____

In the
Supreme Court of the United States

DICO, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The brief in opposition, rather than respond to the arguments in the petition, for the most part merely repeats the holdings of the court of appeals and labels them correct. In doing so, it fails to come to grips with two issues of continuing vital concern that this Court should consider and resolve: (1) the limits of district courts' discretion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, to admit and consider expert testimony lacking support in the factual record, and (2) the conflict between the holding of the Eighth Circuit in this case and that of the Third Circuit in *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993).

1. The overarching reason why the Court should grant the petition on the first question presented is that this case is an excellent vehicle for defining, as none of this Court's prior cases has done, the limits of district courts' discretion to admit and rely on expert testimony of dubious reliability. Pet. 11-12, 13, 21. The brief in opposition fails to respond to that argument. Earlier cases have confirmed the discretion of district courts to *exclude* expert testimony, but this case demonstrates the need for this Court to make clear that there are limits on their discretion to *admit* expert testimony that fails to meet the minimum standards of relevance and reliability set forth in *Daubert, General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).[1]

[1] The government's assertion that "[p]etitioner does not contend that the court of appeals' decision conflicts with any decision of this Court" (Brief in Opp. 7) ignores the fact that the petition repeatedly argues that the Eighth Circuit failed to follow the principles laid down by this Court in *Daubert*, *Joiner* and *Kumho Tire*. Pet. i, 3-4, 12-13, 20-21.

(a) In its brief in opposition the government argues, as did the court of appeals in its opinion, that Mr. Robertson did not rely on either his computer model (Br. in Opp. 9) or his soil boring test results (Br. in Opp. 10) for his conclusion that Dico was the major source of TCE contamination of the groundwater under its property. By doing so, the government invites the Court to assume that neither of those bases for Mr. Robertson's conclusion is defensible on its merits. The government fails to acknowledge, however, that without either the computer model *or* the soil boring tests, Mr. Robertson's opinion lacks any basis whatsoever. Given the undeniable (and now undenied) fatal flaws in both of Mr. Robertson's methodologies, there is no doubt that the courts below erred in admitting and relying on his testimony.

(b) The government's only attempt to defend Mr. Robertson's use of the computer model is its statement that he "properly accounted for flowage from the north by programming it into the model as recharge or rainfall." Brief in Opp. 9. The government's statement is absurd on its face. Arbitrarily substituting hypothetical rainfall for actual contaminated groundwater may satisfy the computer's need for balance, but it certainly does *not* prove that the rainfall existed and the contamination did not.

Alternatively, the government claims (as did the court of appeals) that Mr. Robertson did not rely on the computer model, and that his instruction to the computer to assign zero values to flow from the north was therefore harmless. Brief in Opp. 9. This ignores the fact that Mr. Robertson said in his expert report not only that he relied on the computer model but that it was the "only feasible way" to reach a conclusion regarding groundwater flow paths. Pet. 14. And it also ignores the fact that when Dico challenged the soil

boring tests, the district court itself relied on the computer model as an alternative basis for Mr. Robertson's conclusions. Pet. 69a.

(c) When Mr. Robertson programmed the computer to rule out any contamination from the north, DNAPL was the only remaining explanation for the continued presence of TCE in the remediation wells. But the remedial investigation looked for DNAPL and failed to find it. When confronted with that finding at trial, Mr. Robertson, who was not involved in the investigation, disagreed with the statement in the remedial investigation report that DNAPL was not present. When it was pointed out to him that the highest concentration found was only about one percent, far less than the necessary ten percent, he claimed for the first time (and without citing any authority) that one percent was enough to "indicate" the presence of DNAPL. Tr. 149.

The government, in an apparent attempt to minimize the significance of the remedial investigation, refers to it as having been conducted by "petitioner's own consultant." Brief in Opp. 10. In fact, the government *ordered* Dico to retain a consultant to conduct the remedial investigation at Dico's expense, the government reviewed and commented on interim drafts of the report, and the government accepted the final report only after final review and approval by the EPA. The remedial investigation, therefore, was at least as much the government's as it was Dico's, and the engineering firm that conducted it was Dico's consultant only in the sense that Dico paid the bill.

(d) The government does not deny that the soil boring samples were insufficient to support Mr. Robertson's conclusion, or indeed that they were inconsistent with it. Instead, employing the same strategy it uses to

sidestep the issue of the computer model, the government argues that Mr. Robertson did not rely on the soil boring samples in reaching his conclusion. Brief in Opp. 10. Mr. Robertson's own testimony, however, is to the contrary. Tr. 101 (soil borings were the "primary evidence of the continuous contamination").

The government's argument, moreover, is self-defeating. The brief in opposition argues that Mr. Robertson relied on *neither* the computer model *nor* the soil borings to support his conclusions. Brief in Opp. 9, 10. But if that is true, his conclusions had no support whatsoever. The district court, addressing the inadequacy of the soil boring evidence, stated that "[e]ven if the Court disregarded [that evidence] . . . Mr. Robertson's computer modeling . . . provides sufficient evidence of a causal link." Pet. 69a. But neither the district court nor the court of appeals, nor the government in its brief in opposition, explains what is to be done when both the computer model *and* the soil borings are disregarded. The answer is that, without those bases, Mr. Robertson's conclusions lack any basis whatsoever.

(e) The government's only response to the undisputed testimony that TCE in sludge spread on the ground as a dust suppressant would have evaporated long before migrating through the soil (Pet. 16-17) is to repeat the court of appeals' statement that the testimony was disputed. Brief in Opp. 11. The court of appeals, however, like the government, is mistaken: there was no such contradictory testimony. Mr. Robertson did not dispute Dr. Abdul's calculations or his conclusions. His generalized testimony about the weight and viscosity of TCE as compared to water, cited by the court of appeals and the brief in opposition, had nothing to do with the rate at which it would evaporate. On this subject, the courts below committed an error worse than

admitting unreliable expert testimony: they read into Mr. Robertson's testimony opinions he did not even express.[2]

2. The brief in opposition denies that the Eighth Circuit's decision is in conflict with *United States v. Rohm and Haas Co*, 2 F.3d 1265 (3d Cir. 1993), for the same reason the Eighth Circuit tried to distinguish it: that *Rohm and Haas* involved "removal" while this case involves "remedial action," which includes "monitoring." Brief in Opp. 14. As Dico has pointed out, however (Pet. 27-28), "removal" *also* includes "monitor[ing]," and the Third Circuit in *Rohm and Haas* specifically rejected the argument that "monitoring" authorizes recovery of oversight costs. Because the Eighth Circuit accepted that argument, the conflict with *Rohm and Haas* is unavoidable.

The Eighth Circuit expressly disagreed with two holdings of *Rohm and Haas*: (1) its application of *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), to CERCLA and (2) its holding that CERCLA fails to express a clear Congressional intent that oversight costs are recoverable. On the second point, while the Eighth Circuit purported to distinguish *Rohm and Haas* on the ground that it involved "removal" rather than "remedial action," it addressed exactly the same question: whether "monitoring" (part of the definition of both terms) includes oversight costs. In denying that a conflict exists, the brief in opposition does not explain how the two courts' diametrically opposed constructions of the same statutory language can be reconciled. *See United States v. Serafini*, 898 F.Supp. 287,

[2] The petition also pointed to the uncontroverted evidence that, because concrete is an essentially impermeable substance, TCE could not have reached the soil (let alone the ground water) from the concrete containment pit or the concrete slab where drums were filled. Pet. 17-18. The brief in opposition offers no response.

292 (M.D. Pa. 1994) ("we reject any argument that the removal/remedial distinction renders *Rohm and Haas* . . . inapplicable to the facts of this case").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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